In The

Supreme Court of the United States

No. 77-1039

H. BRUCE FRANKLIN,

Petitioner,

vs.

DALE M. ATKINS, ROBERT M. GILBERT, PROF. BYRON L. JOHNSON, FRED M. BETZ, SR., ERIC W. SCHMIDT, THOMAS S. MOON, JACK KENT ANDERSON and RAPHAEL J. MOSES, individually and in their representative capacities as members of the Board of Regents, of the University of Colorado,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ANTHONY F. RENZO
ACLU Foundation of Colorado, Inc.
718 17th St., Suite 2400
Denver, Colorado 80202
(303) 571-1600
COUNSEL FOR PETITIONER

OF COUNSEL:
Bruce J. Ennis
Joel M. Gora
American Civil Liberties
22 East 40th Street
New York, New York 10016
(212) 725-1222

In The

Supreme Court of the United States

No.

H. BRUCE FRANKLIN,

Petitioner,

vs.

DALE M. ATKINS, ROBERT M. GILBERT, PROF. BYRON L. JOHNSON, FRED M. BETZ, SR., ERIC W. SCHMIDT, THOMAS S. MOON, JACK KENT ANDERSON and RAPHAEL J. MOSES, individually and in their representative capacities as members of the Board of Regents, of the University of Colorado,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ANTHONY F. RENZO
ACLU Foundation of Colorado, Inc.
718 17th St., Suite 2400
Denver, Colorado 80202
(303) 571-1600
COUNSEL FOR PETITIONER

OF COUNSEL:
Bruce J. Ennis
Joel M. Gora
American Civil Liberties
22 East 40th Street
New York, New York 10016
(212) 725-1222

INDEX

APPENDIX

AUTHORITIES CITED

STATUTES AND RULES

OTHER AUTHORITIES

In The

Supreme Court of the United States

No.

H. BRUCE FRANKLIN,

Petitioner,

vs.

DALE M. ATKINS, ROBERT M. GILBERT, PROF. BYRON L. JOHNSON, FRED M. BETZ, SR., ERIC W. SCHMIDT, THOMAS S. MOON, JACK KENT ANDERSON and RAPHAEL J. MOSES, individually and in their representative capacities as members of the Board of Regents, of the University of Colorado,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, H. Bruce Franklin, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix B

hereto. The opinion of the United States District Court for the District of Colorado is reported at 409 F.Supp. 439, and appears in Appendix D hereto.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on June 20, 1977, and appears in Appendix A hereto. A timely Petition for Rehearing en banc was denied on October 25, 1977, and this Petition for Certiorari was filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

Can Petitioner's appointment to the English faculty at a State University be rejected:

1. If the basis for the rejection is the content of political speeches made by Petitioner in opposition to the Indo-China war, which speeches are otherwise protected by the First Amendment; or

2. If the rejection is motivated in part by impermissible First Amendment factors, but the "primary" motivating factor is found to be constitutionally permissible; or

3. If the rejection is motivated by a fear of possible future disruption even though no present danger of disruption exists, and despite Petitioner's

announced willingness to abide by rules of conduct for faculty as well as University policy on academic freedom?

STATEMENT

In December, 1973, Petitioner made application for a faculty position in the English Department at the University of Colorado. At the time of his application, Petitioner, 34 years old, was a world-renowned scholar of American literature who had published nine books and editions and over 30 scholarly articles. Petitioner was also known as an outstanding teacher with the ability to stimulate students. The District Court in its Memorandum Opinion (App. D) made the following finding of fact:

> "He [Professor Franklin] was described in letters of recommendation as one of the outstanding scholars in American literature, perhaps the most accomplished at his age, and as a teacher of ease and confidence, as well as wit, who knows his subject thoroughly and how to get it across . . . ."

The English faculty at Colorado voted to appoint Petitioner by an unusually overwhelming vote, and recommended a specific offer at Associate Professor level. The English faculty's recommendation was reported to Dean William E. Briggs (Arts & Sciences) for his review. Dean Briggs approved Petitioner's appointment, but in the process noted that Petitioner was a Marxist, and therefore, "controversial" within the meaning of a directive given to him earlier to alert

superiors to "controversial" appointments. Dean Briggs' approval was then forwarded to Chancellor Lawson Crowe for his review. Chancellor Crowe found Petitioner's qualifications to be outstanding. Chancellor Crowe also noted Petitioner's Marxist political philosophy and the fact that Petitioner had been dismissed as professor of English at Stanford University some three years earlier for giving speeches at public rallies on the Stanford campus in opposition to the Indochina war. Both Briggs and Crowe reviewed a Report prepared by a Stanford Advisory Committee which recommended in a divided vote that Petitioner be terminated. This Report contained a verbatim transcript of the speeches given by Franklin at Stanford for which sanctions were imposed (App. E), as well as a lengthy summary of surrounding circumstances. (See Summary, App. D)

Briggs and Crowe also were made aware of two news conferences held by Petitioner, one after his termination by Stanford in which he discussed the "institutional violence" of Stanford in depriving a man of his livelihood for exercising his rights of free speech, and a second following a visit to campus by Henry Cabot Lodge in which Petitioner reportedly stated that he supported the student protest of the Lodge visit. Later, Petitioner wrote several articles on academic freedom as it relates to the Stanford incident, including one for Change magazine entitled "The Real Issues in My Case," a copy of which had

been provided by unknown sources to Briggs and Crowe.

After re-evaluation by the English faculty and extensive reviews by university administrators, Petitioner's application received the enthusiastic approval of both Dean Briggs and Chancellor Crowe. The application was then forwarded to University President Frederick Thieme who made the appointment and submitted it for ratification at the April, 1974, meeting of the Board of Regents.

While Petitioner's appointment was making its way through the administrative process, the Regents received from the Board Secretary numerous articles, background materials, and general correspondence pertaining to Petitioner. Most of these materials commented on Petitioner's political activities and philosophy and/or the events surrounding the Stanford incident. These materials included copies of Petitioner's article for Change magazine and the Stanford Advisory Committee Report containing verbatim transcripts of Petitioner's speeches on the Stanford campus. (See App. E)

At the April meeting, President Thieme made a statement in support of Petitioner's appointment and in the process urged the Regents to "make no reference or make no evaluation on this appointment having to do with this man's political reputation," and "in no case should the institution apply political tests." English Department

Chairman Paul Levitt then read a supporting statement and a letter supporting Petitioner's appointment written by R.W.B. Lewis, Professor of English and American Studies at Yale University and the leading scholar in the country in this area. Levitt also reviewed a letter from the Stanford University English faculty showing support for Petitioner and calling attention to the fact that Petitioner's dismissal from Stanford had nothing whatsoever to do with his professional qualifications or his working relationship with fellow faculty members. (See App. H) After additional statements by some of Respondents and Regent Bean, all eight Respondents voted to reject Petitioner's appointment, with Regent Bean voting to ratify it.

At the next regularly scheduled meeting of the Regents in May, Respondent Johnson moved to rescind the earlier vote rejecting Petitioner's appointment, and this Motion was seconded by Regent Bean. Thereafter, several University faculty members and the Faculty Council Chairman spoke to the Regents on behalf of Petitioner. In addition, Petitioner personally attended this meeting and spoke to the Respondents. During his remarks, Petitioner stated unequivocally:

> ". . . if I were to accept an appointment to teach at the University of Colorado, I would be willing - in addition to the usual implicit understandings, or actually explicit acceptance of a contract - be willing to take whatever kind of

pledge people would ask and that I would abide by the rules and regulations of the University of Colorado. I think that is all that can be asked of a faculty member in that regard." (See App. H, p. 76a)

At the Regent meeting on June 25, 1974, all eight Respondents voted not to rescind their earlier vote to reject Petitioner's appointment. During the meeting, Petitioner spoke in his own behalf and stated in part:

"I believe I have a significant contribution to make, and I am prepared to give my personal word of honor, as well as the contractual agreement and required oath that I will support and implement the rules and regulations applying to faculty at the University of Colorado as well as the Constitution of the United States and State of Colorado." (See App. H, p. 80a)

Petitioner also gave enthusiastic support to the definition of academic freedom found in the Faculty Handbook.

After Petitioner's remarks, Respondent Betz quoted a passage from Petitioner's article in Change magazine and pointed out that he (Betz) did not agree with Petitioner's political views as expressed in the article. (App. H, p. 86a)

The vote to reject Franklin was

the first time in its history the Colorado Regents had failed to ratify a faculty appointment made by the University administration and approved by the appropriate faculty department.

Petitioner filed a suit pursuant to 42 USC 1983 for an order directing Respondents to reconsider their decision without reference to constitutionally impermissible factors and for declaratory judgment pursuant to 42 USC 1983 and 28 USC 2201 declaring that Respondents abridged Petitioner's rights under the First and Fourteenth Amendments, and Article X, Sec. C of the Laws of the Regents on Academic Freedom (pendant claim). A subsequent claim for damages by Plaintiff has since been abandoned.

It was clear from the outset of the lawsuit that there was no evidence or contention by Respondents that Petitioner (1) had ever been arrested for or convicted of a crime; (2) that he ever physically interfered or disrupted the functioning of any University; (3) that he ever used force or violence or had been a member of a group that used force or violence to accomplish its aims; (4) that he ever used his classroom as a political forum; or (5) that his relationships with colleagues or students were affected by his outspoken political views.

At the trial the Respondents testified as follows:

1. Respondent Gilbert testified

the most significant factor in his vote to reject the appointment was the remarks attributed to Petitioner at a news conference following an appearance by Henry Cabot Lodge on Stanford's campus in 1971 when Petitioner was reported to have advocated more vigorous protest should have been used to convey opposition to Mr. Lodge's appearance on campus. Gilbert testified his overriding concern was Petitioner's philosophy of academic freedom as expressed in his writings and press conferences. Gilbert interpreted this concept differently and found Petitioner's views to be unacceptable. (App. F)

2. Respondent Betz testified that the "major portion" of his thinking was that Petitioner advocated "way out answers" to national problems. Betz testified he was particularly persuaded to vote against Petitioner because of a passage from Petitioner's article in Change magazine about which he questioned Petitioner at the June Regents meeting. (App. F) Betz testified "I pointed out [to Petitioner] I had other viewpoints about how to correct these things, and that was it." Betz concluded by saying his vote was "based primarly on his [Petitioner's] own statement in 'The Real Issues in My Case.'" (App. F)

3. Respondent Anderson testified that the most important factor in his votes to reject was Petitioner's conduct

at Stanford in 1971, which consisted of the two speeches and verbal protest contained in the Advisory Report. Anderson also testified he was concerned that the University was risking the possibility that circumstances similar to those at Stanford in 1971 would arise at Colorado, and Petitioner would repeat his "disruptive conduct." Anderson also testified his votes were influenced by Petitioner's ties with a radical political group known as "Venceremos." Finally, Anderson testified his vote to reject Petitioner's appointment was influenced by his (Anderson's) projection that University funding would be adversely affected because Petitioner, like the SDS, was on the "far periphery of political thought." (App. F)

4. Respondent Schmidt testified that Petitioner's speeches at Stanford in 1971, and the possibility they would be repeated on the Colorado campus, were the major factors in his decision to reject the appointment.

5. Respondent Moses testified that Petitioner's White Plaza speech and Petitioner's later presence at the Computation Center as a faculty observer constituted "incitement" and was decisive in his vote to reject.

6. Respondent Moon testified his vote to reject was "substantially influenced" by Moon's feeling that his constituency did not support the appointment, and if Petitioner were appointed, University funding would be adversely

affected. Moon based this observation on the unusual controversy surrounding Petitioner's "political activity outside the classroom" in support of "many public causes." Moon also feared disruptive student reaction at Colorado to possible future speeches by Petitioner similar to those he gave at Stanford in 1971. (App. F)

7. Respondent Johnson testified there were four basic factors which were decisive in his vote to reject: one, Petitioner's association with Venceremos; two, Petitioner's speeches at Stanford in 1971 (App. E); three, Petitioner's article in Change magazine; and four, Petitioner's alleged participation in a reported demonstration at the Stanford hospital. Johnson conceded in a written statement that if a college teacher's speech were entitled to the same protections as other citizens, he would have been compelled to vote to ratify Petitioner's appointment. Johnson quoted the AAUP and Colorado Faculty Handbook as imposing "special restrictions" on college faculty, which, under the circumstances of this case, means special restrictions on the content of a faculty member's political expression. Johnson interpreted Petitioner's statement to the Regents that he (Petitioner) did not intend "waiving any portion of the Bill of Rights" as meaning Petitioner did not agree to these "special obligations." Johnson stated that Petitioner was unwilling to waive part of his freedom of speech, which waiver was required of faculty members. (App. G)

8. Respondent Atkins testified his decision was based in part on Petitioner's speeches at Stanford in 1971. Atkins testified that what he objected to in Petitioner's speeches was Petitioner's belief in the use of force to bring about social change, and it did not matter to Atkins whether Petitioner's expression was advocacy or incitement. Atkins also testified his vote was influenced by an article in the National Observer wherein Petitioner was conducting a reporter on a tour of the offices of a political group that believed in armed self-defense. Atkins testified this indicated what Petitioner's "thinking" was. (App. F)

On February 11, 1976, the District Court issued a Memorandum Opinion entering judgment for Defendants. The District Court found Respondents' decision had been influenced by several constitutionally impermissible factors all pertaining to Petitioner's First Amendment rights. In addition, the District Court found the "paramount" motivating factor to be Petitioner's speeches at Stanford which the District Court treated as protected by the First Amendment from criminal sanction. The District Court reasoned, however, that the content of campus speech was subject to "special limitations" and that Petitioner's speeches at Stanford, while protected from criminal sanction, were outside the special limitations applicable to campus speech. The District Court reasoned that since the "paramount" motivating factor was constitutionally permissible, even though other

constitutionally impermissible factors influenced Respondents' decisions, there was no actionable abridgment. In any event, the District Court found Respondents were constitutionally justified in using Petitioner's past expression as a basis for a forecast that Petitioner's presence (and his accompanying "speech") at Colorado might cause future disruption. Finally, the District Court conceded Respondents violated their own laws on Academic Freedom (Article X, Sec. C), but refused to grant injunctive or declaratory relief to remedy that violation. The District Court did not have the benefit of this Court's subsequent ruling in Mt. Healthy Board of Education v. Doyle, ____ U.S. ____, 50 L.Ed.2d 471 (1977), and never placed the burden on Respondents to show by a preponderance of evidence that their decision would have been the same despite the influence of constitutionally impermissible factors.

Petitioner appealed to the Tenth Circuit Court of Appeals and that Court affirmed the judgment of the District Court. The Appeals Court held: (1) that the District Court's "paramount" basis test was the equivalent of the "motivating" factor test enunciated in Mt. Healthy despite the District Court's finding that Respondents' decision was also influenced by subordinate impermissible factors; (2) that the content of speech on campus is subject to a balancing test which permits restrictions which would be impermissible in the community at large; and therefore, (3)

none of Petitioner's speeches, articles or political activity as reported to the Respondents is protected by the First Amendment despite the ruling of the District Court; (4) that if factors found constitutionally impermissible by the District Court were eliminated, the Respondents would have rejected Petitioner because of the speeches at Stanford in 1971; and (5) that Respondents were justified in rejecting Petitioner because of the fear of disruption on the Colorado campus if Petitioner were appointed. (App. B)

Petitioner's Petition for Rehearing en banc was denied on October 25, 1977. (App. C)

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT OF APPEALS DIRECTLY CONFLICTS WITH THE HOLDINGS AND REASONING OF THIS COURT IN HEALY V. JAMES, 408 U.S. 169 (1972), and PAPISH V. BOARD OF CURATORS, 410 U.S. 667 (1973).

The Court of Appeals concluded that Petitioner's advocacy of unpopular ideas, clearly not incitement under the formula set forth in Brandenburg v. Ohio, 395 U.S. 444 (1969), is not protected from penalty by the First Amendment in the college setting. Moreover, in light of the finding of facts by the District Court, the Court of Appeals has ruled that Respondents' and third parties' disapproval of Petitioner's political ideas and

associations is a constitutionally permissible basis for Respondents' refusal to ratify Petitioner's appointment. Likewise, the Court of Appeals approved the District Court's use of the "material and substantial disruption" test found in Tinker v. Des Moines Ind. School District, 393 U.S. 503 (1969), not as limited to an extension of the term "lawless action" within the incitement formula to fit special campus characteristics, but instead as a basis for justifying penalties on the advocacy of political protest on campus which did not constitute incitement under Brandenburg. This reasoning is at odds with this Court's holding in Healy v. James, supra, which rejected "watered down" protections for speech content on campus. As this Court said in Healy at 408 U.S. 192:

> ". . . the critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not." (emphasis supplied)

Instead of adhering to the teachings of Healy, the Court of Appeals cited Pickering v. Board of Education, 391 U.S. 563 (1968) for the proposition that the First Amendment permits special limitations on the content of political speech on campus when those same restraints would not pass constitutional muster in the community at large. This reasoning affirmed the District Court's conclusion that the "material and substantial disruption" test enunciated

in Tinker v. Des Moines, supra, allows special restrictions on campus speech content, even though that speech is protected by the First Amendment from criminal sanction. Having watered down the protection for speech content on campus, the Court of Appeals concludes that none of Petitioner's speeches or writings as presented to Defendants are protected from the imposition of penalty by the First Amendment.

To reach such a result, the Court of Appeals must ignore the holding of this Court in Healy that speech content is entitled to the "full protections" of the First Amendment on campus. This Court said at 408 U.S. 180:

> "Yet the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."

Likewise, in Papish v. Board of Curators, 410 U.S. 667 (1973), this Court made it clear that "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech . . . ." 401 U.S. 671 (emphasis supplied).

The principle that speech content on campus is entitled to the full protections of the First Amendment is supported throughout this Court's decisions and by the knowledgeable

commentators. See Keyishian v. Board of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960); and C. A. Wright, The Constitution on Campus, 22 Vand. L. Rev. 1027 (1969). The only exceptions to this general principle are confined to speech in the classroom or the public expression of "in house" or confidential information which adversely affects working relationships with immediate superiors. See Pickering v. Board of Education, supra, 391 U.S. at 570, note 3.

Despite these well settled principles of First Amendment law, the Court of Appeals has approved the imposition of penalties on Petitioner for the content of political speeches made outside the classroom and completely unrelated to immediate superiors, confidential information, teaching duties, or relationships with colleagues. Such a holding is clearly at odds with the express holding of this Court that when penalties are directed at campus speech content, including the advocacy of campus "disruption," those restraints, like restrictions on speech content in the community at large, abridge freedom of speech unless they satisfy the "imminent incitement" test as set forth in Brandenburg v. Ohio, supra; and Hess v. Indiana, 414 U.S. 105 (1973). Healy v. James, supra, 408 U.S. at 188. See also Comment, Brandenburg v. Ohio: A Speech Test for All Seasons, 43 U. Chi. L. Rev. 151 (1975).

When, as here, the expression which is the object of impingement is

campus political speech outside the classroom, the "special characteristics" of the school are protected by special restrictions on the action elements of expression unrelated to its content (time, place, manner, or mode), and by prohibiting incitement to imminent "material and substantial disruption," which disruption does not necessarily constitute acts of a criminal nature. See Healy v. James, supra, 408 U.S. at 187. See also C.A. Wright, The Constitution on Campus, supra, at p. 1042; and Note, Student Expression on Campus and Interference with the "Rights of Others," 51 Den. L. J. 417 (1974); and T. Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877 (1963). Consequently, speech content on campus is protected from penalty by the First Amendment unless the elements of incitement to imminent "disruption" or other "lawless action" are proven.

That the Court of Appeals is imposing special limitations on campus speech content in this case is made clear from its treatment of Petitioner's Stanford speeches. The Court of Appeals concluded that Petitioner's speeches at Stanford as reported in the Advisory Committee Report to the Respondents were not protected "under prevailing standards." The District Court treated these speeches as protected advocacy under Brandenburg v. Ohio, supra, since there was admittedly an absence of "specific intent," but concluded the imposition of penalties in the college setting was constitutionally permissible.

As the District Court concedes, Petitioner's speeches at Stanford as reported to Respondents were "advocacy" protected from criminal sanction by the First Amendment under the test enunciated in Brandenburg v. Ohio, supra. Besides the fatal absence of specific intent to incite, the Petitioner did not advocate criminal action nor did Petitioner advocate action which would materially and substantially disrupt the work of the school. (App. D) In any event, the temporal nexus required in order to establish the existence of "imminent likelihood of lawless action" was clearly absent where there was an opportunity for opposing views to be expressed (and some were), and the listeners were given a choice and decided by vote what course of action their protest would take after all speeches were completed. See Thorhill v. Alabama, 310 U.S. 88 (1940); and A. Meikeljohn, Political Freedom (1960).

Moreover, Petitioner's Stanford speeches were made during public rallies in areas designated as forums for public debates, and his speeches addressed political issues pertaining to American foreign policy and protest thereof. Respondents conceded at trial that there was no evidence that Petitioner's speeches interfered with classes, or that the mode of those speeches impeded student movement on campus or interfered with other legitimate University functions.

In sum, the Respondents' objections

to Petitioner's Stanford speeches were motivated by the content of Petitioner's speech, not its mode. Consequently, the Respondents' action cannot withstand First Amendment scrutiny, since contrary to the Court of Appeals' holding, permissible "special restrictions" derived from "balancing" formulas are confined to reasonable restrictions on the mode or action elements of expression to meet the special needs of the University. The First Amendment does not permit the imposition of special restrictions on the content of political expression, including the advocacy of political ideas and actions with which Respondents disagree or find repugnant. See Healy v. James, supra; and Brandenburg v. Ohio, supra.

The disturbing reach of the doctrine applied below permitting special limitations on campus speech content is vividly illustrated by the Court of Appeals' conclusion that those motivating factors found by the District Court to have been impermissible were, despite the District Court's findings, not entitled to the protections of the First Amendment. These factors included (1) the Change magazine article; (2) Petitioner's association with a radical political group (Venceremos); (3) projections that certain influential contributors and/or state legislators would protest the hiring of a political radical by reducing financial contributions; and (4) Respondents' disapproval of Petitioner's political views, including his belief in revolution, and his expression of those views. (App. D)

Thus, irrespective of whether Petitioner's Stanford speeches are punishable incitement or protected advocacy, the Court of Appeals is, in effect, holding that a distinguished professor can be penalized by state officials who are offended by his expression of radical political ideas. This Court squarely rejected that reasoning in Healy v. James, supra, at 408 U.S. 187-188:

> "The College, acting as an instrumentality of the State, may not restrict speech or association simply because it finds the views expressed . . . to be abhorrent." See also Police Dept. v. Mosley, 408 U.S. 92 (1972),and A. Meckeljohn, Political Freedom (1960).

In addition, Petitioner's association with the Venceremos, however politically unpopular, cannot be the basis for the imposition of penalties in a college setting. Healy v. James, supra, 408 U.S. 185-186.

Finally, the fact others may disagree with Petitioner's political views or threaten financial reprisal is a constitutionally insufficient basis to justify imposing penalties on First Amendment freedoms. Cox v. Louisiana, 379 U.S. 536 (1965); Watson v. Memphis, 373 U.S. 526 (1963). See also Street v. New York, 394 U.S. 576 (1969).

2. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISION OF THIS COURT IN MT. HEALTHY BOARD OF EDUCATION V.

DOYLE, ____ U.S. ____, 50 L.Ed.2d 471 (1977).

The Court of Appeals found the District Court's use of the "paramount" basis test was "equivalent" to and "perfectly consistent with" the "motivating" factor test enunciated by this Court in Mt. Healthy Board of Education v. Doyle, supra. This holding is contrary to the express language of this Court in Mt. Healthy and subsequent cases interpreting Mt. Healthy.

In Mt. Healthy this Court ruled that Plaintiff establishes a prima facie case of abridgment if he shows that constitutionally protected speech was a "motivating factor." This Court made it clear that a decision could be motivated by more than one factor, and whether the impermissible motivating factor is characterized as "paramount," "substantial" or "subordinate" has no constitutional significance.

To underscore this holding, this Court explicitly held in Village of Arlington Heights v. Metro Housing Development Corp., ____ U.S. ____, 50 L.Ed.2d 450 (1977), that even a subordinate motivating factor may alter the outcome of a decision and, if impermissible, render it constitutionally infirm. 50 L.Ed.2d at 465, note 11, and p. 468, note 21.

The District Court herein found the Respondents had taken into account constitutionally impermissible factors

and never placed the burden on Respondents to show their decision would have been the same despite these impermissible factors. The Court of Appeals concluded that Plaintiff had not carried his burden because impermissible factors admittedly "considered" by Respondents were not "motivating" or "substantial" under the Mt. Healthy standard. (App. B, p. 10a) The Court of Appeals, however, ignores the District Court's findings which make quite clear that, as a matter of fact, these impermissible factors influenced and motivated Respondents' rejection. In fact, Respondents conceded in their testimony at trial that factors later found impermissible influenced their decision to reject Petitioner. (App. F and G) Moreover, the District Court saw as its task to separate these impermissible motivating factors from the "primary" motivating factor which the District Court found to be permissible. (App. D, p. 32a)

Consequently, Petitioner satisfied the Mt. Healthy burden on the present record regardless of whether or not the "paramount" factor (the speeches at Stanford) is also impermissible. In holding, as a matter of law, that subordinate influencing factors which are impermissible are not "motivating" as long as the "paramount" factor is permissible, the Court of Appeals' decision directly contradicts the proper standard in First Amendment cases as enunciated by this Court in Mt. Healthy and Village of Arlington Heights, supra.

Moreover, while the District Court opinion was issued before Mt. Healthy was decided, the Court of Appeals' opinion was issued after the Mt. Healthy decision was rendered and after the parties submitted supplemental briefs directed solely to the Mt. Healthy principle and its applicability to this case. In any event, all circuit Courts of Appeals which had considered this issue prior to Mt. Healthy had ruled that if a decision was in any part motivated by constitutionally impermissible factors, it was constitutionally defective. See Mabey, et al. v. Reagan, et al., 537 F.2d 1036 (9th Cir. 1976); Gray v. Union County Intermediate Education District, 520 F.2d 803, 806 (9th Cir. 1975); Skehan v. Board of Trustees of Bloomsberg State College, 501 F.2d 31, 39 (3rd Cir. 1974); Roseman v. Indiana University of Pennsylvania, at Indiana, 520 F.2d 1364, 1367 (3rd Cir. 1975); Simard v. Board of Education of Town of Groton, 473 F.2d 988, 995 (2nd Cir. 1973); Cook County Teachers U. Loc. 1600, AFT v. Byrd, 456 F.2d 882, 888 (7th Cir. 1972); Fluker v. Alabama State Board of Education, 441 F.2d. 201, 210 (5th Cir. 1971); and Gieringer v. Center School District No. 58, et al., 477 F.2d 1164, note 2 (8th Cir. 1973). This conclusion is supported by the basic constitutional principle in the criminal law that "a conviction which may be based both on constitutionally permissible and impermissible bases must be reversed." Street v. New York, supra; and Stromberg v. California, 283 U.S. 359 (1931).

Thus, this Court, in Mt Healthy, reaffirmed a basic constitutional principle long recognized in the Courts of Appeals and the criminal law decisions of this Court that a decision to penalize may not be motivated even in part by constitutionally impermissible factors. Clearly, the Court of Appeals' decision in this case directly contradicts Mt. Healthy and the basic principle which it reaffirmed. The Court of Appeals' assertion that a motivating factor must be the "paramount" one in order to establish a prima facie case of abridgment drains this Court's decision in Mt. Healthy of meaning and leaves persons suffering penalties motivated in part by constitutionally impermissible factors without redress.

3. THE COURT OF APPEALS ADOPTED A "FORECAST OF DISRUPTION" TEST IN DIRECT CONFLICT WITH THIS COURT'S HOLDINGS IN HEALY V. JAMES, 408 U.S. 169 (1972); AND TINKER V. DES MOINES IND. SCHOOL DISTRICT, 393 U.S. 503 (1969).

The Court of Appeals held that those Respondents motivated by the fear of disruption on the Colorado University campus were constitutionally justified in refusing to ratify Petitioner's appointment. (App. B, p. 12a) This Court has held that the projection of possible future disruption as a basis for the imposition of penalties in the college setting is a "form of prior restraint," Healy v. James, supra, 408 U.S. at 184. And the District Court herein agreed: ". . . it is true that

the effect of the University's action is a form of prior restraint." (App. D, p. 38a) As a form of prior restraint, it bears a heavy presumption against its constitutional validity. See Bantom Books v. Sullivan, 372 U.S. 58 (1963); and Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546 (1975). This "heavy presumption" was applied by this Court to the imposition of penalties by a University in Healy v. James, supra, and this Court adopted the "undifferentiated fear" touchstone of Tinker v. Des Moines, supra, to determine if the University had overcome the presumption, 408 U.S. at 191.

This Court in Healy indicates that the first step in resolving the prior restraint issue in this context is, again, to distinguish advocacy from action. Thus, as a threshold requirement, a forecast of disruption must be a forecast of disruptive action, not a forecast of unpopular advocacy. 408 U.S. at 191, note 22. This Court in Healy made it clear that whether or not the Petitioner advocated a philosophy of "disruption" was "immaterial," 408 U.S. 187. Thus, if Petitioner's past expression is protected advocacy, the Respondents cannot justify a prior restraint based upon a forecast of disruptive action. In this case, Respondents conceded Petitioner had not physically disrupted any university functions at any time and that the actions which Respondents disapproved were limited for the most part to his political speeches, writings and associations.

In any event, regardless of how Petitioner's past political activity is characterized, Respondents' projection was nothing more than "undifferentiated fear." At the time of Respondents' rejection in the Spring of 1974, three years had passed since Petitioner made his speeches at Stanford and it had been two years since the article for Change magazine was written. American involvement in the Indo-China war had ended and Respondents produced no evidence of any kind of turmoil or potential disruption on the Colorado campus if Petitioner's appointment were ratified. Clearly, there was an absence of a present danger of disruptive action sufficient to justify a prior restraint on First Amendment freedoms.

In addition, this Court stated in Healy that the University might justify the imposition of this "form of prior restraint" if the University could show an announced unwillingness to be bound by reasonable school rules governing conduct. 408 U.S. 191-193. In this case, Petitioner stated to the Respondents on two separate occasions that he would abide by all University rules and regulations and the laws of the State of Colorado and the United States Constitution. He gave his support to the University's declaration on academic freedom and his interest in pursuing a teaching career at Colorado. (App. H, p. 80a) Surely, Petitioner's statements rule out any possibility that Respondents' projection of disruption could be justified on the basis of an announced refusal to abide by reasonable rules of conduct.

In short, there was no present danger of disruptive action on the Colorado campus, and Petitioner announced in advance his willingness to abide by rules of conduct for faculty, as well as University policy on academic freedom. Under these circumstances, Respondents' projection of disruptive action at Colorado is no more than "undifferentiated fear" and, as such, insufficient to justify a form of prior restraint on the right of freedom of expression under this Court's holdings in Healy v. James, supra; and Tinker v. Des Moines, supra.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Anthony F. Renzo, #536
ACLU Foundation of
Colorado, Inc.
718 17th St., Suite 2400
Denver, Colorado 80202
COUNSEL FOR PETITIONER

OF COUNSEL:

Bruce J. Ennis
Joel M. Gora
American Civil Liberties Union
22 East 40th Street
New York, New York 10016

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MAY TERM - June 20, 1977

Before the Honorable Oliver Seth, The Honorable James E. Barrett, Circuit Judges, The Honorable Ewing T. Kerr, Senior District Judge

H. BRUCE FRANKLIN, Plaintiff-Appellant, vs. DALE M. ATKINS, ROBERT M. GILBERT, PROF. BYRON L. JOHNSON, FRED M. BETZ, SR., ERIC W. SCHMIDT, THOMAS S. MOON, JACK KENT ANDERSON and RAPHAEL J. MOSES, individually and in their representative capacities as members of the Board of Regents of the University of Colorado, Defendants-Appellees.	)	No. 76-1256 (D.C. No. 74-A-777)

This cause came on to be heard on the record on appeal from the United States District Court for the ---- District of Colorado, and was signed by counsel.

Upon consideration whereof, it is ordered that the judgment of that Court is affirmed.

HOWARD K. PHILLIPS, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 76-1256

H. BRUCE FRANKLIN, Appellant, v. DALE M. ATKINS, ROBERT M. GILBERT, PROF. BYRON L. JOHNSON, FRED M. BETZ, SR., ERIC W. SCHMIDT, THOMAS S. MOON, JACK KENT ANDERSON, and RAPHAEL J. MOSES, individually and in their representative capacities as members of the Board of Regents of the University of Colorado, Appellees.	)	Appeal From The United States District Court For the District of Colorado (D.C. #74-A-77)

Anthony F. Renzo, American Civil Liberties Union of Colorado, Denver, Colorado (Robert C. Leher, Denver, Colorado, with him on the Brief), for Appellant.

Richard A. Tharp, Assistant University Counsel, University of Colorado, for Appellees.

Amicus Curiae brief filed by David M. Rabban, Counsel, The American Association of University Professors, Washington, D.C., joined by Matthew W. Finkin, School of Law, Southern Methodist University, Dallas, Texas, and William W. Van Alstyne, School of Law, Duke University, Durham, North Carolina.

Before SETH and BARRETT, Circuit Judges, and KERR, Senior District Judge*.

SETH, Circuit Judge.

The plaintiff was an unsuccessful applicant for a position in the English Department of the University of Colorado. He was rejected by the Regents of the University, and asserts in this section 1983 action for damages, for declaratory and injunctive relief, that the decision was made on constitutionally impermissible grounds.

Plaintiff had never held a position at the University of Colorado. As the

---

* Of the District of Wyoming, Sitting by Designation.

trial court pointed out, such an applicant is in a somewhat different position as to the sources of available information from a person already employed at the school. There is a greater need to use written evaluations, reports, and letters of recommendation, in addition to the interviews, for outside applicants. This procedure was necessarily followed in handling plaintiff's application. Reports and letters were received, and the Regents apparently received "suggestions" from all directions. This would be expected where elected public officials have before them as a regular part of their duties decisions of this nature. The Regents are not jurors to whom are submitted only those facts purified by filtration through the rules of evidence. Instead, they must do the proper sorting for themselves of the great variety of information. This is the exercise of their duties as public officials, and the result is the official act. This is the only way this part of the machinery of government can work. There must be made a beginning assumption that they were acting in good faith and aware of the constitutional problems. In this day and age, school board members and regents are probably exposed more than any other group to constitutional claims, issues, and arguments in their day-to-day duties. These matters have thus become a part of their regular problem-solving functions. Since they are so exposed to these issues, and receive information, reports, rumors, complaints, and harassment from so many sources, it is understandable that the Supreme Court has held, in substance, that the "consideration" of improper or

constitutionally protected conduct does not ipso facto constitute a violation of constitutional rights justifying remedial action. Mt. Healthy City School District Board of Education v. Doyle, ____ U.S. ____, 45 U.S.L.W. 4079; Bertot v. School District No. 1, 522 F.2d 1171 (10th Cir.). This is the "sorting" that must be done by the board members in the discharge of their duties, and in the sorting they necessarily "consider" a large quantity of information from diverse sources. In Mt. Healthy, the Court accepted the trial court's determination that one of the matters "considered" was protected by the First and Fourteenth Amendments. The standards described in Mt. Healthy will be considered further later in this opinion.

It is understandable that the interest of the Regents here centered immediately on the fact that the applicant had been terminated by Stanford University as a tenured faculty member in 1971. This triggered a demand for the facts surrounding the termination described as being the first of that nature in sixty years at that institution. The termination at Stanford followed a hearing conducted by an Advisory Board composed of seven faculty members elected to review appointments and promotions. The Board submitted a Report recommending dismissal of Professor Franklin after concluding he had engaged in improper conduct. The Advisory Board hearing lasted some thirty-eight days, and there were 111 witnesses. The standards applied by the Board are described in the Report. The Report is described in the opinion filed by the

trial judge, and need not be further described here (see 409 F.Supp. at 441). This Report is the basic data used by the Regents in this case to determine what was the "conduct at Stanford." The trial court used the same phrase, and again the source of the information basically is the Report.

It is apparent that the Regents need give no reason for a refusal to hire, and in fact need have no reason at all. See University of Colorado v. Silverman, 555 P.2d 1155 (D.Colo.), and Colo. Rev. Stats. 1973, § 23-20-112. However, it is equally obvious that they could not refuse to hire for a constitutionally impermissible reason.

Reference should be made here to Pickering v. Board of Education, 391 U.S. 563, for the balancing which must be made in a decision as to whether there was a protected interest. The Court in Mt. Healthy City School District Board of Education v. Doyle, ____ U.S. ____, 45 U.S.L.W. 4079, included a quotation from Pickering when it said:

> "That question of whether speech of a government employee is constitutionally protected expression necessarily entails striking 'a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State as an employer, in promoting the efficiency of the public services it performs through its employees.' Pickering v. Board of Education, 391 U.S. 563, 568 (1968)."

The trial court made the determination as to the nature of the applicant's acts from the testimony of the defendants, from the Report, the Regent's reliance on it, and reliance on its conclusions. The several situations considered in the Report are well described therein and elsewhere, and a clear picture develops as to the applicant's participation in the several incidents. There appears to be no reason why the Regents should not have put the emphasis they did on the Report. The trial court held it was of such a nature that they could rely on it and we agree. The plaintiff does not assert that the descriptions of the events contained in the Report are in any material respect incorrect. He does dispute the conclusions and inferences.

To refer again to the mixture of constitutionally protected conduct with matters not so protected, and the "consideration" of all matters by the Regents, we refer again to the Mt. Healthy decision where the Court referred to the fact that the Board's decision there was between tenure and termination, and said:

> ". . . The long term consequences of an award of tenure are of great moment both to the employee and to the employer. They are too significant for us to hold that the Board in this case would be precluded, because it considered constitutionally protected conduct in deciding not to rehire Doyle, from attempting to prove to a trier of fact that quite apart from such conduct Doyle's record was such

> that he would not have been rehired in any event."

The Court then moved to the burden standards, and held that the burden was properly placed on the plaintiff ". . . to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor' -- or, to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him." The second portion of this burden on the plaintiff thus creates a new measure of "substantial" or "motivating factor" in the Board's decision.

The Court, having held that per se violations do not result from a "consideration" of protected conduct, and referring to plaintiff's dual burden, said:

> ". . . Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." (Emphasis supplied).

The Court so established a test as to the "sorting" done by the Board; thus, in the absence of the protected conduct as a motivating factor, would the Board have reached the same conclusion? Or, if the protected conduct had been excluded, would the same result have been reached?

How is the application of Mt. Healthy to be made to this appeal? The trial court did not have the benefit of the Mt. Healthy opinion as it came down while this appeal was pending, but apparently he did not need it.

The burdens placed on a plaintiff under Mt. Healthy City School District Board of Education v. Doyle are substantial, and we must conclude that the plaintiff here failed to meet the burdens. He failed to show that "his conduct" was constitutionally protected, and he failed to show that "this conduct" was a "substantial" or a "motivating" factor in the decision of the Regents not to hire him.

Thus the Report of the Faculty Advisory Board at Stanford did not describe conduct which was constitutionally protected under the prevailing standards, nor did the other material submitted, and with the application to it in Colorado of Pickering v. Board of Education, 391 U.S. 563, again as directed in Mt. Healthy. Thus as in Pickering, the comparison is of the interests of the plaintiff here as a citizen in commenting on matters of public concern with the interest of Colorado as a prospective employer "in promoting the efficiency of the public services it performs through its employees." The Regents were entitled, under the circumstances, to rely on the facts detailed in the Report, and to rely on the ultimate discharge of the plaintiff Franklin to whatever extent they considered proper. The Report was not shown to be erroneous as to the

constitutional matters. The plaintiff did not demonstrate that the Report as so considered was in whole or in part a description of constitutionally protected conduct, nor was it anything else. As indicated above, the description of the incidents was in some considerable detail in the Report, and otherwise, but did not on balance include what were constitutionally protected rights.

As to the second portion of plaintiff's burden, that the constitutionally protected conduct was a "substantial" or "motivating factor" in the Regent's decision, the plaintiff also failed in his proof. Assuming there were "impermissible" factors described in the Report, or otherwise, the plaintiff did not show that these factors were a substantial or motivating factor in the decision not to hire. The trial court, on this point, stated that the plaintiff must show that one or several of the prohibited considerations were "paramount" in the refusal to hire. The trial court held that plaintiff did not meet such a burden. This was a failure of proof, and we must agree with the trial court's evaluation of the testimony. This is equivalent to a failure to meet the Mt. Healthy standard of substantial or motivating factor referred to above.

The trial court also moved to an "in any event" position and found as a fact that the vote would have been the same had impermissible matters not been "considered." The trial court held (409 F.Supp. at 452):

> "Since it is apparent that the outcome of the vote would remain unchanged even ignoring the considerations proscribed by University regulation, it would be futile to grant plaintiff the injunctive relief sought under those regulations."

The "considerations proscribed by University regulations" are for all practical purposes those matters which plaintiff asserts to be constitutionally protected. The regulations require that the Regents in faculty appointments be not influenced by ". . . such extrinsic considerations as his political, social, or religious views."

All in all, the standards applied by the trial court are perfectly consistent with the subsequent opinion of the Supreme Court in Mt. Healthy.

The trial court in the last portion of its opinion considers the danger of disruption factor which was felt by some of the Regents. We agree fully with the analysis of this aspect of the case as made by the trial court.

AFFIRMED.

APPENDIX C

SEPTEMBER TERM - OCTOBER 25, 1977

Before Honorable David T. Lewis, Chief Judge,
Honorable Oliver Seth, Circuit Judge,
Honorable William J. Holloway, Jr., Circuit Judge,
Honorable Robert H. McWilliams, Circuit Judge,
Honorable James E. Barrett, Circuit Judge,
Honorable William E. Doyle, Circuit Judge, and
Honorable Ewing T. Kerr, Senior District Judge.

H. BRUCE FRANKLIN, Plaintiff-Appellant, vs. DALE M. ATKINS, ROBERT M. GILBERT, PROF. BYRON L. JOHNSON, FRED M. BETZ, SR., ERIC W. SCHMIDT, THOMAS S. MOON, JACK KENT ANDERSON, and RAPHAEL J. MOSES, individually and in their representative capacities as members of the Board of Regents of the University of Colorado, Defendants-Appellees.	)	No. 76-1256

)
AMERICAN ASSOCIATION)
OF UNIVERSITY)
PROFESSORS)
)
Amicus Curiae.)

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by appellant in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Seth and Barrett and District Judge Kerr, to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS
CLERK

Appendix D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action 74-A-777

H. BRUCE FRANKLIN,

Plaintiff,

v.

DALE M. ATKINS, ROBERT M. GILBERT, PROF. BYRON L. JOHNSON, FRED M. BETZ, SR., ERIC W. SCHMIDT, THOMAS S. MOON, JACK KENT ANDERSON, and RAPHAEL J. MOSES, individually and in their representative capacities as members of the Board of Regents of the University of Colorado,

Defendants.

The American Civil Liberties Foundation of Colorado, by Mr. Anthony F. Renzo, Attorney at Law, 718 17th Street, Suite 2400, Denver, Colorado; Mr. Louis A. Bluestein, Attorney at Law, 770 Grant Street, #244, Denver, Colorado; and Mr. Robert C. Leher, Attorney at Law, 1901 W. Littleton Blvd., Littleton, Colorado, for Plaintiff; Mr. Richard Tharp, Assistant University Counsel and Mr. George D. Dikeou, Assistant University Counsel, University of Colorado, Regent Hall, Box 13, Boulder, Colorado, for Defendants.

MEMORANDUM OPINION

ARRAJ, Chief Judge

On December 13, 1973, Plaintiff H. Bruce Franklin made application to one of two available faculty positions in the English Department at the University of Colorado. Although his application was one of several hundred submitted, the English faculty approved his appointment in January, 1974, by the "overwhelming" vote of twenty-six to five (one abstention). Pursuant to subsequent independent investigations and interviews, plaintiff's appointment also received the approval of the Dean of the College of Arts and Sciences, Mr. William E. Briggs, the then Vice-President of University Affairs and Provost, Mr. Lawson Crowe, and the President of the University at that time, Dr. Frederick Thieme.

At the regular meeting of the Board of Regents of the University of Colorado on April 25, 1974, Dr. Thieme presented plaintiff's application for consideration with his recommendation. However, the Regents voted eight to one against approval. On June 25, 1974, at another regularly scheduled meeting of the Board, the same Regents voted to refuse to reconsider the earlier vote. The eight individual Regents voting against plaintiff on each occasion are the named defendants.

Plaintiff brings this action under 42 U.S.C. § 1983, seeking injunctive relief and damages against each defendant, and, pursuant to Rule 57, Fed. R. Civ. P.,

a declaratory judgment. Injunctive and declaratory relief is also sought for the alleged violation of the University's own regulations by the defendants, and we have previously determined that the Court will consider this pendent claim. Jurisdiction, claimed to exist by virtue of 28 U.S.C. §§ 1343, 2201, and 2202, is apparently conceded.

If is plaintiff's claim that each defendant's decision was based primarily, if not solely, on Professor Franklin's belief in Marxism, his advocacy of that political belief and philosophy in his speeches and writings, and his participation in various political movements, groups, and demonstrations, thus abridging his First Amendment rights to free speech and association, as well as violating University regulations. Defendants respond that the decision not to hire Mr. Franklin was a valid exercise of the discretion vested in them, and involved a determination that the hiring of plaintiff was not in the best interests of the University of Colorado. Trial was to the Court, and this opinion shall constitute our findings of facts and conclusions of law.

Before turning to a consideration of the issues involved in the resolution of the present matter, it is necessary to point out what is not at issue. Only one of the defendants entertained any doubt as to the outstanding academic qualifications of Professor Franklin, and all agreed that his scholarly achievements and teaching abilities were not an issue. He was described in letters of recommendation as one of the outstanding

scholars in American literature, perhaps the most accomplished at his age, and as a teacher of ease and confidence, as well as wit, who knows his subject thoroughly, and how to get it across. Nor is there any evidence that Professor Franklin ever improperly used his classroom as a forum for the advocacy of his political views.

The Board of Regents, however, were not limited in their consideration of Franklin's application to his academic qualifications and teaching abilities alone. There is

> no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness. Fitness for teaching depends on a broad range of factors. Shelton v. Tucker, 364 U.S. 479, 485 (1960); Beilan v. Board of Education, 357 U.S. 399, 406 (1958).

This is particularly true in the case of a potential applicant, rather than that of a present employee seeking to continue in his position. The state's interest in obtaining even marginally relevant information about an applicant is greater because of the lack of other, more direct information from his conduct as an employee. Developments in the Law, Academic Freedom, 81 Harv. L. Rev. 1045, 1075 (1968).

This is not to say that the determination may be placed on any basis. The Regents may decline to hire a professor for a good reason or, perhaps,

no reason. But it may not do so for a bad reason if that reason is one's lawful exercise of constitutionally protected rights. Shumate v. Board of Education of County of Jackson, 478 F.2d 233, 234 (4th Cir. 1973); Weathers v. West Yuma County School District R-J-1, 387 F. Supp. 552, 561 (D. Colo. 1974). This would allow the government to produce a result indirectly which it could not command directly. Perry v. Sindermann, 408 U.S. 593, 597 (1972). Thus, while the interest of an applicant in obtaining a position may be less compelling than that of an employee in retaining his position, Developments in the Law, Academic Freedom, supra, we pointed out in our previous opinion in this matter that the indirect abridgment described in Sindermann would nevertheless be present where the application is denied because of the exercise of the constitutionally protected interests in free speech and association. Our task in this case is therefore to determine whether the defendants based their decisions on grounds which impermissibly abridge plaintiff's constitutional rights, or on considerations prohibited by their own regulations, or both.

I.

Plaintiff had become a controversial figure in 1971 while teaching at Stanford University. On March 22 of that year the University President, Richard W. Lyman, filed a Statement of Charges against Franklin, alleging that he had participated in various campus disruptions and made speeches inciting others to lawless actions. Because of the importance the

subsequent hearing on those charges and the circumstances which gave rise to them will assume in the resolution of the matter now before the Court, it is necessary to recount those events in some detail.

Pursuant to university regulations an Advisory Board, composed of an elected body of seven faculty members responsible for the review of professional appointments and promotions, held hearings on the charges preferred. The Board initially determined that the standard it would utilize in considering speeches by Professor Franklin was that suggested by the Supreme Court in Brandenburg v. Ohio, 395 U.S. 444 (1969). It concluded that Franklin could not be found culpable unless any advocacy was directed to inciting or producing imminent lawless action, and was likely to produce such action. It further determined that Franklin could be found culpable of any charge only by "strongly persuasive," rather than a mere preponderance of, evidence.

The opinion rendered by the Advisory Board at the end of the hearings dealt for the most part with charges arising from what became known as "the Lodge incident" and from the events of February 10, 1971. As to the former, it was alleged that on January 11, 1971, Ambasasdor Henry Cabot Lodge attempted to deliver an address in the Dinkelspiel Auditorium, but was prevented from doing so by the disruptive conduct of various people in the audience. That conduct included loud shouting, chanting, and clapping. It was charged that Professor

Franklin was in the audience and knowingly and intentionally participated in the disruptive conduct.

Although the disruption was not denied, the evidence was conflicting as to the extent of Professor Franklin's participation. The Board concluded that while Franklin did engage in loud shouting on at least two occasions when the rest of the audience was quiet, and possibly at other times as well, the evidence was not strongly persuasive that this shouting took place during the time Lodge was at the podium, nor was it strongly persuasive that Professor Franklin's conduct included "chanting and clapping" as specified in the charges. The Board therefore unanimously refused to sustain the specific charge. It did, however, note that Professor Franklin's right to speak must be balanced not only against the rights of Mr. Lodge to speak, but also against the rights of others to hear and to assemble peacefully. It could not accept the view that the interruption of University functions, let alone their disruption, was a part of the appropriate function of a faculty member at Stanford.

As to the events of February 10, 1971, the Advisory Board observed at the outset that the "climatic events" of that date did not occur without warning. Dissatisfaction with the Indochina war was rising again because of rumors that an invasion of Laos was about to begin, perhaps with participation of American armed forces. In addition, the Stanford Judicial Council had been holding hearings on charges brought against students

accused of disrupting the January speech of Ambassador Lodge. The preceding several days had been characterized by overt turbulence and escalating protest activities.

Beginning at about noon on February 10, a rally took place at the White Memorial Plaza. It was charged that Professor Franklin intentionally urged and incited students and other persons present at the rally to disrupt University functions and business, and specifically to shut down a University computer facility known as the Computation Center.

Franklin had concluded his speech at that rally by stating:

> See, now what we're asking is for people to make that little tiny gesture to show that we're willing to inconvenience ourselves a little bit and to begin to shut down the most obvious machinery of war, such as, and I think it is a good target, that Computation Center. [applause and shouts of "right on . . ."]

Shortly thereafter a large number of students and others left the rally and went to the Computation Center and many did occupy the Center, prevent its operation, and obstruct movement in and out of the building for several hours.

The Advisory Board concluded that, in the context of the events of the previous few days, other statements by Franklin, and the political climate at that time, Professor Franklin must reasonably have expected that his speech at

White Plaza would increase the likelihood of illegal occupation of the Computation Center immediately following his speech, and that there was risk of serious damage to the computer and its users. It found the evidence strongly persuasive that Professor Franklin had urged and incited his audience at White Plaza towards disruption of University functions and the shutdown of the Computation Center. The Stanford Advisory Board unanimously sustained the charge.

The next charge concerned the events at the Computation Center itself. After making the White Plaza speech, plaintiff had gone to his 1:15 class. When he discovered that only seven of the 150 students enrolled were present, and that many were at the computer center, he moved the class to an area outside the center. After the center had been illegally occupied for about three hours, during which time some damage had occurred and the occupiers had refused University requests to leave, police declared the occupation unlawful and ordered the demonstrators to disperse. Professor Franklin and others protested. When a police official denied Franklin's protest, it was alleged that he strode into the crowd, denying the legality of the police order to disperse and shouting at another professor to stay as a "faculty observer." Three witnesses testified that he then urged the crowd to defy the police order, although Franklin denied this, and the evidence was conflicting.

The Board found, with two members dissenting, that the evidence was

strongly persuasive that Professor Franklin did intentionally urge and incite others to disobey the order to disperse, thereby increasing the danger of arrest or injury to others present.

On the evening of February 10, a rally was held in the Old Union Courtyard to, among other things, discuss methods of protesting developments in the war in Indochina. It was asserted that during the course of the rally Professor Franklin spoke twice and intentionally urged and incited students and other persons present to engage in conduct calculated to disrupt activities of the University and of members of the University community, which threatened injury to individuals and property. Shortly thereafter students and other persons were allegedly assaulted by persons present at the rally, and later that same evening other acts of violence occurred.

In his first speech that evening Professor Franklin spoke with concern about people who must spend time in jail, emphasized solidarity within the "movement," and opposed betrayal of political prisoners. In an "intense" delivery, he then said in part that the people get very upset when they find their beautiful campus "crawling with pigs who stop and harass people and rip off and beat half of the people." He urged that others be taught about such evils as Stanford's complicity in the war and about the necessity to free all political prisoners. Franklin expressed the view that the student "strike" a year earlier had been a success, and he then closed by restating the necessity

to continue the struggle to win others to his viewpoint.

Later in the rally Professor Franklin spoke again for about two minutes. At the hearing Franklin testified that in his second speech he told those from another organization that it was important for people to understand that it was a united front, and that people will respond on different levels of action and with different degrees of consciousness to the war. He ended by telling them that the "people's war" meant that they should go back to the dormitories, organize people into small groups, and talk with them, or play football, or whatever, as late into the night as possible, so as to keep the police occupied.

Other witnesses testified that Franklin concluded by suggesting that people go back to their dormitories, meet in small groups, and decide to do "whatever they wanted to do as late at night as possible so as to bring more police onto the campus to help out their brethren in other communities." At this point, in one witness' opinion, the nature of the meeting changed dramatically, leading him to expect that illegal or disruptive incidents would follow. Another witness thought the crowd got very excited as a result of the speech. Another thought that Franklin's statements were "inflammatory."

Witnesses for Professor Franklin heard phrases similar to those reported by Administration witnesses but interpreted them not to include militant

action. However, some apparently did testify that "people's war" to them included harassment of police and doing whatever the conscience dictates, which might include "trashing."

Taking into account the content, context, and delivery of the speeches, as well as the makeup of the audience to which they were delivered, the majority of the Advisory Board found that the urging of immediate retaliatory action towards the police and University was clear. It concluded that Franklin intentionally urged and incited his audience to engage in conduct which would disrupt activities of the University and of members of the University Community and threaten injury to individuals and property.

Two members of the Board again dissented. While admitting it was quite possible that Professor Franklin advocated a range of actions some of which may have been illegal, and that the speeches might be said to have added, along with other speeches at the rally, to the risk that prohibited conduct might follow, the dissenters did not find the evidence strongly persuasive that his speech constituted the advocacy of imminent lawless action.

In determining the appropriate sanction the Stanford Advisory Board observed that Professor Franklin always attempted to stay on the permissible side of conduct, in order to preserve his position at the University, while at the same time hoping that illegal acts would come about and doing what he could within the law to encourage them. It

noted that the continuous probing of the University's will to enforce its rules might lead to a high likelihood of future transgressions, quite apart from the Board's findings of fact on the charges before it. Thus, while appreciating that dismissal was a penalty of undoubted severity, the majority of the Advisory Board believed that immediate dismissal of Professor Franklin from the University was warranted. The two dissenters found this to be too severe, each instead recommending suspension for a period of time.

Plaintiff contends that his activities at Stanford fell within the constitutional protection of the First Amendment, and that a decision not to hire could not be based upon that conduct. It is further asserted that the Regents were precluded from even considering the Stanford incidents, absent a prior judicial determination that Franklin's activities there were not constitutionally immune. Finally, plaintiff contends that the decision of each defendant was in any event based primarily, if not solely, on disagreement with plaintiff's political views and advocacy of those views, as well as his past association with revolutionary groups. The Court will consider the last contention first.

II

It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or association at the schoolhouse gate. Healy v. James, 408 U.S. 169, 180 (1972); Tinker v. Des Moines Independent

Community School District, 393 U.S. 503, 506 (1969). It has been said that no more direct assault on academic freedom can be imagined than for school authorities to be allowed to discharge a teacher because of his or her political, philosophical, or ideological beliefs, Board of Regents of State Colleges v. Roth, 408 U.S. 564, 581 (1972) (Mr. Justice Douglas, dissenting), and the same would be true of a decision not to hire. Thus, the University, as an instrumentality of the State, may not restrict speech or association, even by the subtle and indirect coercion of refusal to hire, simply because it finds the views expressed by any group or individual to be abhorent [sic]. See, Healy v. James, supra, 183, 187-88.

There are those who may think it ironic that in our system of government the zealous protection of free speech requires that the mantle of free expression be extended to those who seek it so that they may advocate the violent overthrow of that very system, while condemning the right of others to express views opposed to their own. But the protection of the citizen in the expression and even advocacy of these views is vital in creating the vibrant atmosphere in which the search of scholarship can best flourish. Our Supreme Court has often recognized the necessity of such protection:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional

> rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government. De Jong v. Oregon, 299 U.S. 353, 365 (1937); Keyishian v. Board of Regents, 385 U.S. 589, 602 (1967).
>
> "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." . . . The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection." . . . Keyishian v. Board of Regents, supra, at 603.
>
> To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain

> free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); Keyishian v. Board of Regents, supra, at 603.

A refusal to hire therefore may not be cloaked with the justification that the refusal is in the best interests of the University, if the true underlying rationale is personal disagreement with the applicant's viewpoints and associations for, as just seen, the Board members' own interests are not necessarily identical to the best interests of the school. Pickering v. Board of Education, 391 U.S. 563, 571 (1968).

The Court agrees with plaintiff that defendants not only could not base the decision disapproving his appointment on the above justification, it could not base it upon a concern that the appointment would generate controversy on campus, if the cause of that controversy were merely the political views and associations of plaintiff. Neither could the decision be grounded upon a fear that a Regent's constituency would not approve the appointment of a Marxist, or that the state legislature or certain alumni would reduce the financial support received by the University. Nor could it even be based on the fact that plaintiff believed in the necessity of political assassination under certain circumstances, and believed that Ambassador Lodge should be treated as a war criminal, to be tried and executed as at Nuremburg. In sum, no matter

how abhorent [sic] Franklin's political or philosophical views may seem to some, their advocacy may not be made the basis of a refusal to hire, at least where it does not affect the employment relationship or disrupt school discipline, as will be more fully discussed.

The Court further agrees that the quite candid testimony of various Regents reveals that each of the above considerations were in fact taken into account to at least some extent by one or more of the defendants. This does not, however, necessarily mean that the defendant [sic] is entitled to the relief requested. To be entitled to relief because of these impermissible considerations, plaintiff must further show that one or more of them was the paramount reason for the refusal to hire. See, Bertot v. School District No. 1, Albany County, Wyoming, 552 F.2d 1171, 1182 (10th Cir. 1975).

> [I]f judged by constitutional standards, there are valid as well as invalid reasons for the discipline or discharge of a teacher, such discipline or discharge will not be set aside by the federal courts so long as the invalid reasons are not the primary reasons or motivation for the discharge. Starsky v. Williams, 353 F.Supp. 900, 916 (D. Ariz. 1972) (emphasis added).

Otherwise, a teacher could engage in unpopular activities simply to insure the permanency of his employment. Note, Civil Rights - Academic Freedom - Refusal to Rehire a Nontenured Teacher for a

Constitutionally Impermissible Reason, Part B, Refusing to Rehire a Teacher in a Situation Where Both Constitutionally Permissible and Impermissible Reasons are Present: A Problem of Selective Enforcement, 1970 Wis. L. Rev., 168-69.

There can be no more difficult task for a court than to try to discern the thought processes which led to a certain result, much less to ascertain the primary motivation. In this case it it [sic] necessary to carefully consider the evidence relating to each defendant.

Defendant Robert Gilbert testified that he became convinced that Franklin did not believe in academic freedom, and that this was a major reason in denying the appointment. He also testified that it was important that Franklin believed in political revolution, and had advocated the necessity of political assassination. It significantly affected his decision that Franklin had said after the Lodge incident that more force should have been used.

The true import of Mr. Gilbert's concern, however, is indicated by the fact that he was convinced that Professor Franklin was stating what he thought he should have done during the Lodge incident. For Mr. Gilbert this apparently indicated a propensity toward unlawful conduct, not merely advocacy of political views. The evidence shows that Gilbert sought out articles on academic freedom so as to better understand the difference in academic freedom and conduct destructive of that freedom. In the end he gave the "most weight" to the findings of the

Advisory Committee at Stanford, a finding by a group of Franklin's peers that plaintiff had engaged in culpable conduct, and determined that it was not in the best interest of the University to hire someone "involved extensively" in the Stanford turmoil.

The testimony of Regent Fred Betz shows that because Franklin advocated some "way out" answers to certain national problems Betz was concerned that plaintiff's appointment would generate controversy on the campus already caught up on the turmoil of the imminent dismissal of the University President. He was also bothered by certain statements in Franklin's article, "The Real Issues In My Case," relating to the opinion that there was need for revolutionary violence in a decaying society, and that it might be correct in certain circumstances to assassinate or kidnap political leaders, or to burn down the Stanford Computation Center.

While these concerns were in themselves not a sufficient basis for disapproving the appointment, further testimony again shows the dominant concern to have been with the past behavior of Mr. Franklin, not merely his philosophical views. For Mr. Betz the article merely showed the "full thinking" of Franklin, someone who had previously influenced students to violence. At the time of the second vote the element of controversy was no longer important, but Mr. Betz still voted against Franklin because he had concluded that Franklin had "crossed the line into disruption at Stanford." He further concluded that Franklin had incited people to prevent

Lodge from speaking, even though plaintiff had been acquitted of the specific charges by the Stanford Advisory Board.

Regent Jack Anderson's votes were based on both Franklin's conduct and speeches in the past which for him formed a "pattern of conduct" of inciting disruptive activities. He therefore did not interpret the Franklin article as merely making a philosophical point. Mr. Anderson believed that the past conduct was indicative of possible future conduct. The evidence does show that he was concerned that University funding would be affected by the vote and that he was bothered that Mr. Franklin had in the past been associated with revolutionary groups. Defendant was also concerned about an incident involving a hospital disturbance in which Franklin allegedly participated, as communicated in the "Lindee letter." Even though Franklin later denied even being at the hospital at that time, Mr. Anderson remained unconvinced. He was further worried that the University President might be attempting to pit the faculty and students against the Regents in an effort to save his job. Ultimately, however, the "controlling factor," the "primary influence," was the pattern of conduct, the definite participation in disruptive activities as a member of the faculty with the students at a major university. For Anderson, the risk of the appointment outweighed any possible benefit.

Regent Eric Schmidt testified that he voted against Franklin on both occasions based on the Advisory Report, as well as the reticence of some members

of the English Department to commend the public lectures of Franklin and some of his writings. He found it significant that the Stanford Advisory Committee had found Franklin culpable of three charges, including inciting students to occupy the Computation Center and violating a police order to disperse. He was bothered by the fact that the Stanford report showed that Franklin would go to the line of inciting people, and it did not appear that he had foresaken that type of behavior. Schmidt testified that his vote had nothing to do with Mr. Franklin's political views. It was rather that the risk of bringing him on campus made it not worth having a purported exceptional scholar, whose scholarship Mr. Schmidt described as adequate.

The testimony of Defendant Raphael Moses makes it clear that the "decisive factor" in his vote was the Advisory Report, describing Franklin's speeches and his actions at the Computation Center. He felt the speeches, combined with going to the center and his actions there, took Prof. Franklin's conduct out of the area of First Amendment behavior. The fact that Franklin was not charged with any crime at the time was "not the matter at issue" with Moses. It was rather the distinction between beliefs and actions.

Regent Thomas Moon testified that his vote was <u>not</u> solely based on the controversial nature of Franklin's political views, although he candidly admitted that this was one of the factors which he considered. He too was concerned that the appointment process was being

abused by the University President. But again the overriding concern was that the appointment would increase the unrest on campus, due to the method Franklin used to implement his political philosophy. He was afraid the incidents at Stanford might be repeated at the University of Colorado.

Professor Byron Johnson found the problems to be with citizen Franklin. It was not that Franklin was a Marxist, or "per se" that he believed in violence to change government, but rather the past conduct of Franklin, as presented in the Stanford Advisory Report. He too was influenced by the alleged participation of Franklin in the hospital incident. For him the risks of hiring Franklin were the risks of the occurrence at C.U. of incidents such as those occurring at Stanford involving a group movement on a University. He found the full report of the Stanford Committee the "single most persuasive document," since he knew four members of that Committee were highly regarded. Professor Johnson concluded that Franklin had gone beyond free speech, and had breached the special obligation owed by the faculty to protect the "delicate flower of academic freedom."

Dr. Dale Atkins objected to the fact that Franklin advocated the use of force to bring about social and political change, and unequivocably stated that he would not hire anyone inciting or even advocating violence. While we have previously stated that it was not the perrogative of a regent to refuse the appointment merely because of Professor Franklin's political beliefs and the advocacy of them, Dr. Atkins found the

"main objection" to be the things for which plaintiff had been found culpable at Stanford. He considered Franklin a "troublemaker."

There was other testimony as to statements that had been made by defendants at different times, and various statements were also disclosed in the minutes of the Regents' meetings. But nothing appears which overcomes the predominant theme underlying the votes of each defendant. The speeches and activities of plaintiff at Stanford were the paramount reasons which led to the votes to disapprove his appointment, both because the defendants perceived that conduct as falling outside the realm of protected free speech, and because the pattern of conduct indicated to them a substantial risk of similar occurrences on the University of Colorado campus should plaintiff receive a faculty appointment. It is therefore necessary to turn to a consideration of that conduct, and the extent of protection afforded plaintiff by the constitution and university regulations.

III.

The plaintiff having raised a claim of a violation of his rights to free speech and association, this Court must now make an independent examination of the evidence in order to insure that the controlling legal principles may be applied to the actual facts of the case. Pickering v. Board of Education, 391 U.S. 563, 578-79 n. 2; Starsky v. Williams, supra, at 904. Apparently based on this premise, plaintiff analogizes the refusal

of defendants to hire to various cases involving prior restraints on speech, which have limited the government's ability to prevent the showing of allegedly obscene material or to enjoin meetings. E.g., Southeastern Promotions, Ltd. v. Conrad, ____ U.S. ____, 95 S.Ct. 1239 (1975); Freedman v. Maryland, 380 U.S. 51 (1965). Plaintiff concludes that the Regents could not base the refusal to hire on their own determination that Franklin's conduct at Stanford was not constitutionally protected, absent a prior judicial determination that his conduct was in fact not constitutionally immune from governmental sanction. We reject plaintiff's conclusion.

While it is true that the effect of the University's action is a form of prior restraint, Healy v. James, supra, at 184, the Supreme Court has never interpreted this to mean that there must be a prior judicial determination of no constitutional immunity before a university can act. The Supreme Court has in fact explicitly rejected plaintiff's analogy as a basis of requiring prior judicial consideration, and held that there is not even a right to a prior administrative hearing. This is because

> . . . the State has not directly impinged upon interests in free speech or free press in any way comparable to a seizure of books or an injunction against meetings. Whatever may be a teacher's rights of free speech, the interest in holding a teaching job at a state university, simpliciter, is not itself a free speech interest.

> Board of Regents of State College v. Roth, 408 U.S. 564, 575 n. 14; Perry v. Sindermann, supra, at 599 n. 5; Skehan v. Board of Trustees of Bloomsburg State College, 501 F.2d 31 (3rd Cir. 1974).

Thus, while the judicial decision must be based on an independent determination of the actual facts, that determination does not have to precede university action. Further, in making its independent determination, the Court may give due weight to the findings of an administrative hearing at a university, where such findings were reached by correct procedures and supported by substantial evidence. Duke v. North Texas State University, 469 F.2d 829, 838 (5th Cir. 1973); Ferguson v. Thomas, 430 F.2d 852, 859 (5th Cir. 1970); Starsky v. Williams, supra, at 904.

The Court does agree that since the effect of the Regents' action is a form of prior restraint, where the existence of a constitutional right is established there is a heavy burden upon defendants to demonstrate the appropriateness of their action, Healy v. James, supra, at 184; Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966), and this burden must be met by clear and convincing evidence. Smith v. Losee, 485 F.2d 334, 339 (10th Cir. 1973). However, the initial burden of demonstrating the existence of the constitutional right is upon the plaintiff. Id. In this case, the burden was upon plaintiff to demonstrate that his conduct at Stanford was constitutionally immune from criminal sanction.

The evidence presented other than Franklin's own testimony included his letters and articles, letters and articles by others commenting on the Stanford incidents, including a letter from Charles C. Marson, Legal Director of the American Civil Liberties Union of Northern California, and of course the Advisory Report of the Stanford Advisory Board. The characterization of Franklin's activities at Stanford presented by this evidence is naturally conflicting. At least one of the charges against Franklin was sustained by the unanimous vote of the Advisory Board, but it must in all fairness be pointed out that, while ostensibly applying the Brandenburg criminal standard of liability for incitement, the Board at various times referred to the fact that Franklin could "reasonably have expected that his speech would have contributed to the likelihood of the occupation" and that he "could reasonably have expected" that it would "increase the likelihood of illegal occupation of the Computation Center immediately following his speech, and that there was risk of serious damage to the computer and its users." Both references appear to incorporate a lesser standard of liability than the Brandenburg test. It is not clear whether the members of the Board realized this difference, or whether the findings of culpability were based on one of these references or a conclusion that the Brandenburg standard had been met. Moreover, neither this Court nor any of the defendants have read the actual transcript of those hearings, and the bulk of the evidence presented

in this case as to what transpired at Stanford was hearsay. In short, it is impossible for the Court to determine the extent of constitutional immunity that plaintiff should be afforded from criminal culpability for his conduct at Stanford, based on the evidence presented. However, it is not necessary to resolve this issue, for it is clear that whether or not Franklin's conduct there was unlawful, defendants have met their burden of demonstrating the appropriateness of their actions.

IV.

In stressing that neither Stanford nor the University of Colorado could in any way sanction or even consider the conduct of Franklin at Stanford unless it were judicially determined that his conduct was criminally culpable, plaintiff fails to

> carefully distinguish the exercise of [First Amendment] rights peculiarly involved in the employer-employee relationship from broader rights of speech and association. Local 858 of A.F. of T. v. School District No. 1 in Co. of Denver, 314 F.Supp. 1069 (D. Colo. 1970).

Further, First Amendment rights must always be applied in light of the special characteristics of the environment in the particular case and, where state-operated educational institutions are involved, the Supreme Court has long recognized the need for affirming the comprehensive authority of the States and of school officials, consistent with

fundamental constitutional safeguards, to prescribe and control conduct in the schools. Healy v. James, supra, at 180. The Supreme Court in Healy concluded that school authorities could sanction conduct materially and substantially disrupting school discipline, even though that conduct was perhaps not unlawful.

> In the context of the "special characteristics of the school environment," the power of the government to prohibit "lawless action" is not limited to acts of a criminal nature. Also prohibitable are actions which "materially and substantially disrupt the work and discipline of the school. . . . Associational [and speech] acitivites need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education. Healy v. James, supra, at 189.

Mr. Justice Rehnquist stressed this distinction in his concurring opinion:

> The government as employer or school administrator may impose upon employees and students reasonable regulations that would be impermissible if imposed by the government upon all citizens. And there can be a constitutional distinction between the infliction of criminal punishment, on the one hand, and the imposition of milder

> administrative or disciplinary sanctions, on the other, even though the same First Amendment interest is implicated by each. Id. at 203.

That school authorities may balance the rights of teachers to speak out on matters of public concern against the interests of the University as an employer, and act upon the basis of conduct found to be materially or substantially disruptive, though not unlawful, is not a novel proposition. E.g., Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 513 (1969); Pickering v. Board of Education, 391 U.S. 563, 568 (1968); Bertot v. School District No. 1, Albany County, Wyoming, 522 F.2d 1171 (10th Cir. 1975); Whitsel v. Southeast Local School District, 484 F.2d 1222 (6th Cir. 1973); Duke v. North Texas State University, 469 F.2d 829 (5th Cir. 1973); Siegel v. Regents of University of California, 308 F.Supp. 832 (N.D. Cal. 1970). This Court recogized the distinction in Trujillo v. Love, 322 F.Supp. 1266, 1270 (D. Colo. 1971), where we stated:

> In the context of an educational institution, a prohibition on protected speech, to be valid, must be "necessary to avoid material and substantial interference with schoolwork or discipline."

Thus, though Franklin's conduct at Stanford may not have been criminally culpable, the fact that the defendants based their refusal to hire on that conduct would not have been

constitutionally impermissible, if in fact his actions materially and substantially interfered with University activities and discipline there. After independently reviewing the record, we are convinced by "clear and convincing" evidence that it did.

V.

As plaintiff concedes, a separate but related basis for the refusal to hire which could have been and was relied upon was the fear of disruptions on the University of Colorado campus. Certainly, in a situation of potential disruption there is no requirement in the law that the proper authorities must wait for the blow to fall before taking remedial measures, Birdwell v. Hazelwood School District, 491 F.2d 494 (8th Cir. 1974), for it is the duty of school officials to prevent the occurrence of disturbances. Haynes v. Dallas County Junior College District, 386 F.Supp. 208 (N.D. Tex. 1974). However, plaintiff contends that the Board's action could permissibly be based on the fear of disruption only if Franklin had demonstrated a "clear and present intent to materially and substantially disrupt University functions or violate reasonable University rules or regulations." While the Court agrees that an undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression, Tinker v. Des Moines, supra, at 508, we think the correct test is whether there was a sufficient evidential basis to support a reasonable conclusion that Franklin posed a substantial threat

of material disruption. Healy v. James, supra, at 189; Esteban v. Central Missouri State College, 415 F.2d 1077 (8th Cir. 1969); Birdwell v. Hazelwood School District, 352 F. Supp. 613 (E.D. Mo. 1972), affirmed, 491 F.2d 490 (8th Cir. 1974).

Having independently reviewed the evidence, the Court finds that there were facts which reasonably led the several defendants to forecast material disruption of school discipline and the employment relationship, were Professor Franklin to be appointed to the faculty of the University of Colorado, and we further find the refusal to hire to be an "appropriately related and narrow response." Healy v. James, supra, 189-90 n. 70. It is important to note that the forecast was not of conduct of a citizen unrelated to the University, or even public criticism of the University by a potential employee, but rather was the forecast of actions disrupting University activities materially and substantially, perhaps even bringing injury to persons at or the property of the University which was to hire him. The relief requested by plaintiff under § 1983 must therefore be denied.

It is necessary that the precise holding in this case be understood. The Court has only concluded that this is not a case of refusal to hire based primarily on objections to political beliefs, the advocacy of those beliefs, or associations with various political movements. See, Hetrick v. Martin, 480

F.2d 705, 708 (6th Cir. 1973). By denying the requested relief the Court does not mean to intimate any viewpoint on the wisdom of hiring or not hiring Professor Franklin. The Court is aware that when widespread publicity and denunciation accompany the imposition of disabilities, the result may be public disgrace and ostracism having a far greater deterrent effect on speech than would be the deprivation of benefits alone. Notes and Comments, Civil Disabilities and the First Amendment, 78 Yale L. J. 842, 860 (1968-69). If in fact Professor Franklin were unjustly charged and found culpable at Stanford, it would be most unfortunate that such action could bar Professor Franklin from employment elsewhere. But absent constitutional violations it would be intolerable for the courts to interject themselves, emasculate the discretion of the Regents, and require an educational institution to hire a professor whom it deemed undesirable and did not wish to employ, for Courts are not equipped by either training or experience to select the faculty for colleges and universities. See, Duke v. North Texas State University, supra, at 838. In this case, to require defendants to hire Professor Franklin or to grant damages would go beyond redress of his constitutional rights. This we cannot do.

VI.

Article 10, § C of the Laws of the Regents, entitled "Academic Freedom," provides in pertinent part that the discretion of the Board of Regents to appoint faculty members is limited to

consideration of the

> individual's ability in teaching, research, writing or other scholarly activities and should not be influenced by such extrinsic considerations as his political, social, or religious views . . . .

As we earlier observed, various defendants did take into account certain constitutionally impermissible considerations in reaching their individual decisions, and to the extent that these considerations included plaintiff's political or social views those defendants did violate the Laws of the Regents. However, as also previously noted, the primary motivation of each defendant in disapproving the appointment was either that Professor Franklin had engaged in disruptive conduct at Stanford directed at that University, or that there was a substantial threat, based on the pattern of his past conduct, that he would engage in such activity at the University of Colorado, or both. The refusal to hire based on these considerations is not only constitutionally permissible, but also in conformity with the Laws of the Regents. Since it is apparent that the outcome of the vote would remain unchanged even ignoring the considerations proscribed by University regulation, it would be futile to grant plaintiff the injunctive relief sought under those regulations.

Judgment shall enter for defendants in accordance with the foregoing opinion.

Dated at Denver, Colorado, this

11th day of February, 1976.

BY THE COURT:

ALFRED A. ARRAJ, Chief Judge
United States District Court

APPENDIX E

TRANSCRIPT OF PROFESSOR FRANKLIN'S SPEECH DURING THE NOON HOUR ON FEBRUARY 10, 1971

People are complaining about the meeting going on a long time. [Laughter from the audience] But, you know, you see I think that we could inconvenience ourselves for a few minutes considering what we're trying to do here. Now, there were some, there were some hot emotions at the beginning of the meeting, when Bob Grant and Larry Diamond tried to subvert what we were doing. And I think a lot of people misunderstood where things were and what was coming down. Because they believed that they're really very sincere people and so forth. And not that we're some kind of lunatic who just has some private axe to grind; we being the radicals, the revolutionaries. The fact of the matter is that a lot of us were doing precinct work out in the community in 1964, and at that time we were opposed by the Bob Grants and Larry Diamonds of the world. We were called Traitors and Saboteurs of the war at that time. In 1965 the most radical act here was when 24 people stayed overnight in an all-night vigil at the fountain and people came down and beat us up and threw us into the fountain. In '60, in late '65 or eary '66, when we had here the first act in the United States of open identification with the Vietnamese people, and a blood drive in North Vietnam, people threw garbage at us. Called us "dirty jew bastards" and "traitors" and so forth. And at every point, you see, when the movement was

being built, there have been people who have come out to talk about the tactics alienating the vast mass of people and we understand where that's coming from. Now they come out here and tell us that we shouldn't be doing anything on the University. We should be going into the community. We're the last ones in the world to oppose doing anything in the communities. The fact of the matter is that most of our comrades are working full-time in the community 'cause they come from the community, and they're brown and black and white working-class and poor people. And, see, there's a very extreme form of false consciousness that's created on a university campus. Because we get the illusion because there are a lot of people gathered here that this is a, this is the most advanced opposition to the war. But that poll that was cited, it wasn't a poll of people who were in favor of the McGovern-Hatfield Amendment. They don't know what the fuck that is. It was a poll of people who want to get out of Southeast Asia right now and that poll, which is, and remember it was a poll of people over 21, and mostly white, but that poll showed something. And that is that 60% of those people with a college education wanted to get out of that Southeast Asia now. 70% of people who only have a high school education want to get out of Southeast Asia now, and 80% of people with only a grade school education want to get out of Southeast Asia now. [applause] . . so want to talk about, about high consciousness, high consciousness is the consciousness of the people most oppressed by U.S.

imperialism, which includes as a main institution of that Stanford University. And that's why whenever people from that community, whenever poor working class youth from that community, get a chance to come on the campus at Stanford and do a little material damage, they are very eager to do so. Because they recognize what Stanford University really is, even if people here don't. Now, see, what the question is, the question of what we do. Now people get up here and talk about workers striking, and the important this is for us to go out into the community, and tell the workers to strike. Well, that, I mean, it's true that, that the workers have the ability in the long run to bring the war to an end. The war that started with the extermination of the Indian people and black people, and Mexican people, and went on to the point where extermination of people in Southeast Asia. Yes, it's working people who can do that if they strike. But to ask us, for us to ask workers to risk their chances to survive, to physically survive, by really striking, when we can't do a kind of fake strike, is to stand the world on it's head. [applause] Well, when we talk about, see we're just ripping off that term strike when we talk about striking at Stanford. This isn't a strike. We're not risking anything. It's a voluntary boycott. A shutdown of some of the University as a demonstration of something. Now, now what we called a strike last year, and it lasted really about three days and it kind of dragged on, and, you know, in an odds and ends way and some people did it. But just the fact that we were

able to move our little finger that much, that electrified the working people of this area. That's a fact and the people who were down there on that picket line, down at shipping and receiving, knew that practically every single truck driver who came there when he saw us on strike said "Okay." He was prepared to risk his job and turn that truck around. And in four states, four states, teamsters linked up concretely with student strikers and said that they would strike if the students were willing to strike. And factory workers were walking out. And the day after that we called that strike there was a record absenteeism of all factories in the Bay area. See, now what we're asking is for people to make that little tiny gesture to show that we're willing to inconvenience ourselves a little bit and to begin to shut down the most obvious machinery of war, such as and I think it is a good target, that Computation Center. [applause] [Shouts of "right on...."]

TRANSCRIPT OF PROFESSOR FRANKLIN'S FIRST SPEECH AT THE OLD UNION COURTYARD ON THE EVENING OF FEBRUARY 10, 1971

First of all I want to say that I think that was a premature vote. And I certainly think that we should have a revote. I think this is a very important discussion that we're having now, particularly because....
KZSU interrupts: You are now listening to Bruce Franklin.
Franklin cont'd: There are people here tonight who are new to the movement and there are other people who have been in the movement a long time. Now, I would like to ask of those people who voted, that free all political prisoners should not be one of the demands. I would like to know how many of those people have ever been in jail?
KZSU interrupts: No one raising their hand.
Voice in crowd: Why?
Franklin cont'd: Now I would like to assure you, see that, if you're in jail that can be a very lonely experience. And if you're in jail because you've been fighting for the people, if you realize that those people were then abandoning you and saying well, you know, somehow cut into our support, if we make your freedom one of our demands, you would feel betrayed. And I would like to say to the people who are new to the movement that what this movement is all about is brotherhood and sisterhood and love of people for each other, and we love those political prisoners. We know that they're in jail for us, that they're part of our struggle. So

we wouldn't be out here tonight if it hadn't been for them. [applause] KZSU interrupts: In case you just joined us, there are approximately 350 people here at the Old Union Courtyard. Bruce Franklin is currently speaking. A contingent of 100 persons from Roble Hall came down here in a group to represent their views. It was their belief that the demands of the demonstration should be limited to ending the war in Indochina and to drop the demand of freeing all political prisoners, which is currently one of the three demands held by this group through which their strike is being based and represented by. There was a vote to change the demands to limited to just one, that being-get U.S. out of Indochina. The vote was defeated, voting to maintain all three demands. Then a representative from Roble got up and said that he and his hundred fellows did not believe that the demands should be maintained as all three but limited to just the first, and now Bruce Franklin is trying to defend his point of view that freeing all political prisoners should be maintained as one of the demands of the group, and now back to Dr. Franklin. Franklin:... and we can't betray them. And another part of this is, we can't say, we can't separate the war in Southeast Asia from the war at home. We can't turn our backs on our black brothers and sisters here at home who are part of this struggle and who are today, not us, they are the ones who are the vanguard. And we get very upset when we find our beautiful campus crawling with pigs who stop and harass people and tip off and beat half of the

people. Well, this is just a very, very mild taste of what life is like in the black and brown communities of this country, where the pigs come by every night, and if you're young, if you're black and brown, they stop you and ask your I.D. and rip you off for suspicion of burglary and where there are dogs there, and where there's a helicopter overhead, and that's part of the same struggle. And the Black Panthers-and where they shoot you. And the pigs are here tonight. Those San Jose pigs have just murdered a black brother in San Jose. Right, the same San Jose pig just murdered a black brother down in San Jose and that's normal life down there. People murdered in the streets and that's why we call them pigs. Although it's a little unfair to the four-footed variety, because they don't do that kind of thing. [applause] Now the real leadership of our struggle is the Black Panther Party, and the reason that they are the leadership is because they represent the most oppressed people in this country and because they have shown in theory and in practice that they are leading our struggle. And the Black Panther Party is now teaching us a new concept, a new word, and that word is called intercommunalism. And the Black Panther Party teaches us that the people of Laos and the people of South Vietnam are not another separate nation state, that they are our brothers and sisters because they are just other oppressed communities of the same empire. The Black Panther Party teaches us that today, while this meeting was going on, brothers and sisters, blood brothers and sisters of us,

were killed in Laos, in Vietnam and Cambodia, in the black and brown communities of the United States of America. They teach us this is all one struggle and the interconnections are every place. Even if you think about what Laos is all about; what is the chief cash export of Laos, who knows? Crowd: Opium, heroin? Franklin: Opium, all the heroin on this coast comes from Laos. It's all brought in by the C.I.A. It is grown and harvested by Meo tribesmen and flown out on Air America, the C.I.A. airline. And it is brought in to this state as part of the oppression, particularly of black and brown people here, but also of white youth....
KZSU interrupts: This is Bruce Franklin speaking now. He's now discussing what he believes the motives are for the war in Laos, in Indochina and, according to him, so the C.I.A. can bring hard drugs, such as heroin, into this country to be given to the minority groups to further oppress them, in his words.
Franklin:...and is just as much a part of the counter-insurgency system as the pigs are war on this campus. So the war in Laos is not a separate thing that we can separate out, and it's necessary that there will be some people who will not participate in the actions somehow because there are those other two demands that Stanford get out of the war and that all political prisoners be freed. I think that's too bad. I don't think there will be that many people, but I don't think, say, that we should just forget those people, I think we have an absolute obligation to go out to those people and teach them what we have learned in the course of this movement.

But just on a practical level, let me say one other thing. That last year after the same kind of struggle we raised these very same demands and had a student strike all over this country, and it was a strike that was on such a high level for a student strike that large numbers of workers began to join that strike because they understand what this is all about. And I think that if people disagree with any of these things that I have been saying, or other people have been saying, they should get up there and we should discuss it, and it's worth the time that it takes to struggle this out. Power to the people. [applause, shouts of "right on."]

APPENDIX F

Regent Gilbert, Record, p. 196-197

Q Did your consideration of Professor Franklin's appointment convince you that Professor Franklin did not believe in the tenets of academic freedom?

A Yes, I became convinced of that.

Q And did this lack of belief in the tenants of academic freedom influence you in your decision?

A Yes, probably one of the major reasons.

p. 203-204

Q . . . Did he ever, to the best of your knowledge, personally use force in the State of Colorado or State of California or anywhere else?

A No.

Q So, aren't you saying that he really advocated the use of force?

A Yes, as you stated a moment ago, he said he thought more force should be used rather than less in the Henry Cabot Lodge incident. This affected me materially.

p. 210-212

Q I am somewhat concerned because you keep referring to what he said after. If you would please refer to the minutes

which you have before you from June 25, Attachment 27, page 11, third paragraph, I believe it is the last sentence, where you state, "But what bothered me, as I told him, was that in his statement in the Advisory Board hearings and in the evidence he presented to the committee, he reiterated the fact that in his opinion the extent of the violence used by others in disrupting the Henry Cabot Lodge speech was not severe enough and if he would have had the opportunity he would have taken even more violent means." Is that the statement you are referring to?

* * *

A (Continued) Well, I am clearly in error. I certainly wasn't alluding to any statements made to the Advisory Board hearings. What I was alluding to here was the statement that he made to the press immediately following the announcement of the decision with respect to what he would have done under those similar circumstances. I was well aware of the fact that he had not disrupted himself nor had he been found guilty of disruptive conduct with respect to the Henry Cabot Lodge speech. Nonetheless, that speech was disrupted and he was unable to give it, and Mr. Franklin stated in his opinion that was proper conduct and the only thing he disagreed with was more force wasn't used, and that to me was untenable for a college professor who believes in academic freedom.

p. 222

Q Now, you have als- said that you tried to consider the appropriateness of

his conduct. What conduct is that that you tried to consider?

A Well, I disapproved in general of his expressions of how to resolve a problem by the use of force rather than discussion . . . .

Regent Betz, Record, p. 233-235

Q Mr. Betz, I'm handing you what's previously been marked as Plaintiff's Exhibit Number 5, and ask you if one of the statements to which you referred is found in that article?

A I would say this was the item that particularly persuaded me not to vote for Mr. Franklin.

Q And what particularly in that article persuaded you?

A Well, beginning on page 32, it says, "Now, we make no attempt to hide our belief in the need for revolutionary violence as part of the struggle for people to survive against the violence of the decaying U.S. empire. We believe that the oppressed peoples of the ghettos and barrios and reservations of the U.S. must follow the example of the peoples of Indo-China in waging people's war against the empire, and we see poor and working white people starting to realize that in order to survive amidst the collapse of that empire, they must actively unite with their Third World sisters and brothers. At this moment in history we believe it vital, for all who can, to oppose by any means necessary the counterrevolutionary

violence being directed against the poor and working people of Indo-China and the United States."

And I asked Mr. Franklin at the time is that his statement and he said it was.

Then we went on to the next sentence, "Under certain circumstances it might be correct to assassinate or kidnap members of the U.S. ruling class, to burn down Stanford's computer, to ambush the police or to physically attack right-wing organizations," and I asked him if that was his statement, and he said it was, so ---

Q Did you ask Professor Franklin about that statement during the June meeting of the Board of Regents?

A Yes, I had this before me and I asked him these questions and I pointed out that I had other viewpoints about how to correct these things, and that was it.

p. 241

Q Now, Mr. Betz, did your reasons, if you will, change between the first vote and second vote?

A No, I don't think so. I think probably they were confirmed. I -- I mean I did some reading about the case in between times. I recognized that some of the things Mr. Franklin stood for, I stood for myself, such as the opposition of the war in Vietnam, but when I ran into this

situation where he said we had to stop it by various tactics that he outlined, why I left him there.

p. 244-245

Q Mr. Betz, isn't it true that your decision to vote against Professor Franklin was not based primarily on the Stanford Advisory incidents?

A It was based primarily on his own statement in "The Real Issues in My Case".

Regent Anderson, Record, p. 270

Q Well, did you feel that the University funding would be affected if you approved Professor Franklin's appointment?

A Yes.

Q And wasn't this one influencing factor in your vote?

A Yes, I think it did have some influence on my vote.

Q Now, how did you arrive at the conclusion that Professor Franklin's application would have consequences as far as University funding was concerned?

A I was far more concerned with, let's say, the basis of alumni giving than I was with what could or possibly would happen with the legislature. I had gone back in the SDS days and immediately

thereafter it seemed to be quite documented that alumni giving was down substantially to the University as a result of the unrest and what had occurred on the campus during that period of time. Now, it was my interpretation that particularly in the area of alumni giving to have a, let's say, a person as a member of the faculty with a track record of disruptive conduct could well have the same effect as far as people who desired to contribute to the University.

p. 271-272

Q Mr. Anderson, you referred to the SDS. What did the SDS and Professor Franklin have in common.

A Nothing that I know of.

Q Well, isn't it true that you believed that Professor Franklin and the SDS could both be classified as the far periphery of political thought?

A Yes.

Q Isn't that what they had in common?

A Well, okay.

Q Now, did you express this same concern about reduced alumni contributions in a meeting you had with several students and faculty prior to the second vote?

A Yes, I did.

Regent Moon, Record, p. 366-367

Q Was another substantially influencing factor the fact that you felt if you appointed Professor Franklin it would affect University funding?

A Yes, I felt that anything that contributed to or augmented the feeling of conflict, unrest at the University, has an influence on funding.

Q Well, wasn't your concern on the influence on funding the result of Professor Franklin being controversial?

A Yes.

Q Isn't it true, Mr. Moon, that not all so-called controversial appointments would lessen University funding and support?

A Yes, I would certainly agree.

Q But you felt this appointment had generated an unusual amount of controversy, is that right?

A Certainly.

Q Did you evaluate the reasons the appointment was controversial?

A Yes.

Q Did you conclude the appointment was controversial because Professor Franklin was politically active outside of the classroom?

A Yes.

Q Just for clarification do you see any distinction between the advocacy of violence and the incitement of violence?

A Yes, as a matter of degree.

Q But does that degree make any difference to you?

A No.

Q With respect to making a decision with Professor Franklin?

A No.

Q Now, you know that a Marxist advocates the use of force for social and political change, do you not? We discussed this earlier, is that correct?

A I don't know. You stated that. I didn't.

Q Is that what you believe a Marxist advocates?

MR. THARP: Your Honor, I am going to object to the relevance of this inquiry again.

THE COURT: The objection is overruled. You may answer.

A I believe that's true.

Q And you knew that Professor Franklin was a Marxist, isn't that correct?

A Yes.

APPENDIX G

THE REGENTS OF THE UNIVERSITY OF COLORADO

Byron L. Johnson
Regent
2451 S. Dahlia Lane
Denver, Colorado 80222

The AAUP Statement on Professional Ethics concludes with: "V. As a member of his community, the professor has the rights and obligations of any citizen. He measures the urgency of these obligations in the light of his responsibilities to his subject, to his students, to his profession, and to his institution. When he speaks or acts as a private person he avoids creating the impression that he speaks or acts for his college or university. As a citizen engaged in a profession that depends upon freedom for its health and integrity, the professor has a particular obligation to promote conditions of free inquiry and to further public understanding of academic freedom."

The Carnegie Commission on Higher Education, in their final report (at page 61), disagree, and ask that this rule should be changed. "Faculty members should not be held to higher standards in their roles as citizens than are other citizens.....without imposed special obligations." I gather from his statement last month that Bruce Franklin holds the latter position, that in accepting University rules and regulations he does "not...intend...waiving any portion of the Bill of Rights.."

The CU Faculty Handbook, (1970 edition, Section II, Pp. 25-29) provides "All

appointments to the General Faculty are made by the Board of Regents, subject to the Constitution and Statutes of Colorado and in accordance with the rules and policies of the University then in force." The Regents policy on academic freedom agrees with the AAUP, that "his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence he should at all times be accurate, should exercise appropriate restraint and show respect for the opinions of others..."

The Regents policy on Standards of Conduct holds that "all members of the academic community have a special responsibility to protect the University as a forum for the free expression of ideas. University students, faculty, and staff shall refrain from conduct disruptive of University functions; from injury to persons or damage to property on the campus; and from impeding freedom of movement of students, school officials, employees, and invited guests to all facilities of the University. Interference in any manner with the public or private rights of citizens, or conduct which threatens or endangers the health or safety of any person, or damage to property will not be tolerated, and the...principal executive officer...may summarily suspend those involved...subject to...due process ..bearing in mind that university bodies act as administrative rather than judicial tribunals." My judgment is to continue to uphold these policies. If

the Carnegie Commission rules were applied, I would reluctantly approve.

APPENDIX H

Regent Meeting, April, 1974

Supporting Statement by
Chairman Paul Levitt

"I want to thank the Regents for readjusting the agenda in such a manner that they are willing to address this issue now, and I want to thank President Thieme for saying what he did. I can only assume we are people of good faith, and we will go ahead on that basis, and on that basis I wish to address myself.

"For one thing, in one ironic sense, H. Bruce Franklin has been a member of this University for a long time. The English Department faculty have for years been using his edition of Herman Melville's novel Marty, his edition of the Scarlet Letter, his edition of The Confidence Man. We use Future Perfect, which is one of the most outstanding books of its kind in science fiction, and The Wake of the Gods is a landmark work in Herman Melville studies. We have used these for years, and nobody has protested the presence of those works in our library or in our classrooms.

"Professor Franklin has, in addition to being evaluated by our own English Department faculty, and the American Literature Group in particular, and I regard them as very competent people, and been evaluated by other scholars in American Literature. I have a letter in the file here from one of the most distinguished professors of American

Literature in the United States, R.W.B. Lewis, Professor of English and American Studies, Yale University. I shall not subject you to the entire letter although I will happily submit it in evidence.

"The summary of the letter says: 'I am extraordinarily impressed by Franklin--as a person, whose company I would thoroughly enjoy and benefit from; as a teacher, a scholar, and a writer.' It continues, 'I have said nothing about the unhappy episode at Stanford, when a body of entirely honorable and humane men voted (with two important negatives) to dismiss him from the faculty because of his conduct in certain anti-war demonstrations. I have discovered that I simply do not know the facts of the case as well as I should; and, in any event, the verdict is being appealed, and there seems a good likelihood that it will be reversed. I would only say that, if Franklin were a candidate for a position at Yale University, (and I wish there were an opening for him there) the Stanford affair would not for a moment deter me from arguing as vehemently as I could in his favor. With others, I have had reason recently to deplore the startling lack of accomplishment and even (so far as one can observe) of promise of the people of Franklin's age who are engaged in English and American literary studies. To this sorry state, Franklin is a striking exception. He would add an invaluable presence to any faculty and to any University community.'

"I should also like, if you will indulge me just a couple of minutes longer, to

enter two additional documents into this discussion. One is by Professor Robert McAffee Brown, who is professor of religious studies at Stanford, and one of the dissenting members on that Stanford board. I am not going to discuss the political issue except that in the course of his letter, since we are talking about academic competence, he says, 'It needs to be clear that the advisory board hearing (sic) were in no way investigating Professor Franklin's abilities as a teacher. It was never contested that his classroom performance was of the highest, that his scholarly writings in his own field were singularly impressive, and that his ability to stimulate students had made him one of Stanford's most sought-after professors. Thus, no negative judgment concerning Professor Franklin's professorial competence as a lecturer, scholar, researcher, etc., can rightly be drawn from the Board's action. Members of your department are surely aware of his superior academic qualifications, and there is no need for me to comment on them, save to point out that in my own teaching in the area of 'theology and literature', I have used his book on Melville with great profit.'

"Last month, in a scholarly journal called 'College English', 12 members of the Stanford English Department took out an ad at their own expense. I should like to read you that ad. 'Associate Professor H. Bruce Franklin was dismissed from Stanford University in January of 1972 on charges that did not relate to his teaching. We do not intend to comment on his case here. It

is under review, initiated by the American Civil Liberties Union of Northern California, and the courts. Despite his qualifications and his many efforts, Franklin has been unable to find another academic job. Yet academic jobs, though scarce, are by no means unavailable.

"Most of us do not agree with Franklin's political views. But we believe that his analysis of literature and society from the perspectives of Marx, Lenin, and Mao has a right to be taught, and that he is eminently qualified to teach it. He has published distinguished studies of American literature and science fiction as well as works, both original and edited, about revolutionary politics. He is known to be a first rate teacher. The year before he was dismissed from Stanford, the English Department recommended him, on the basis of his teaching and scholarship, for promotion to full professor. The administration turned the recommendation down on the technical grounds of insufficient time in grade. Franklin should have a job in the American academy. We urge departments of literature throughout the country to consider his appointment.'

"The record goes on and I am quite happy to make it all available to you, including his bibliography, and so on. The point for me here is that I think the English Department of the Boulder Campus recognized the controversial nature of the appointment. I think they acted with careful judgment in this case. We met for hours to discuss it. The vote was 28 to 5. The department felt that this man, his scholarly record, and

his teaching record were so outstanding that, for the price we would get him, we were going to steal him. I do not want to get into a discussion of academic salaries, but I would in closing just urge you to take a chance.

"As President Thieme has pointed out, it is not a tenured position, and I do think after all that the University rests on the principle of reformation or change. If we did not believe that, the students who come to us at 18 years old would be the same when they left at 22, 23, 25 or whatever it is. We believe that people are capable of change, and growth, and improvement. I believe that, otherwise I would not teach--I would not want to be Chairman of the English Department. I would also say that it is because people took a chance that we do not think the world is flat; nor that the sun revolves around the earth. I do not have to lecture you on these things, and I apologize if I seem to be doing so, but it means a great deal to the Department of English, I think, and to the University that the principle of self determination be observed. The faculty have shown some care, some discretion, some judgment in this matter. The English Department decision should be honored, and I assume you will respect our judgment. Thank you."

Regent Meeting, May, 1974

Statement of Dr. H. Bruce Franklin in Support of His Appointment to the Faculty of the University:

"I would like to thank the Board of Regents for extending the courtesy of allowing me to speak here. I would like to make a couple of points clear at the beginning. I am here under the assumption that the eight gentlemen on the Board who voted against my appointment on April 25, 1974, were doing so because they had been misinformed and had been given, not only inadequate information, but also a great deal of information that was not true (would have been the milder term.)

* * *

". . . if I were to accept an appointment to teach at the University of Colorado, I would be willing--in addition to the usual implicit understandings, or actually explicit acceptance of a contract--be willing to take whatever kind of pledge people would ask and that I would abide by the rules and regulations of the University of Colorado. I think that is all that can be asked of a faculty member in this regard.

"I have also made my position very clear that I do not thereby intend to make a condition of employment my waiving any portion of the Bill of Rights attached to the Constitution of the United States.

* * *

"A member of the Board of Regents referred to my beliefs as 'crowding the line.' I was shocked because in a university community, if we understand anything about the first amendment to our constitution, and the revolutionary violence that brought about the first amendment to the constitution, and what it means to live in a society where we, at least perhaps have the illusion of being able to speak freely, it is this, that the one area of speech and belief that we are protecting with that first amendment is precisely that area that 'crowds the line.'

* * *

"It is perfectly obvious that this speech--which is not considered dangerous, which is not controversial, which does not 'crowd the line,' which does not outrage significant segments of the society--does not need any protection. It does not need protection, when what you are saying is what everybody already believes. So that, when you attack this speech, that 'crowds the line' the speech that is considered dangerous is that when you are attacking that basic freedom and the freedom from which all other freedoms flow, because, if we do not have the freedom to speak our mind, then we certainly do not have the freedom to do anything, to change anything that we do not like in society.

* * *

"I must say, speaking frankly, that there are times when I feel like saying,

'This is just not worth it, and there may be better things to do with one's life than having a series of this kind of confrontations with established powers and prejudice and so on; however, then I realize that it is not possible to behave in any way as a responsible citizen by backing off, and that my case, again for better or worse, is a case of national significance, and the decision which the Board of Regents of the University of Colorado made on April 25th, is having repercussions in universities and colleges right now throughout the country.

"I think that it is also--I admit this--educating people about certain social and political relations of our society, and that is probably to the good. But given the facts which have been stated and have been in print, what is really incumbent on the Board of Regents, at this time, is to undo the damage that was done on April 25th, to respect the professional judgment of the University of Colorado, and to recognize officially that there is a place, not only for academic freedom, but for true freedom at the University of Colorado. Thank you. I am sorry I spoke so long."

Regent Meeting, June, 1974

Shortly after the meeting was reconvened at 1:30 p.m., and prior to requesting action on the motion before the Regents, Chairman Gilbert asked Dr. Franklin to proceed with his presentation. The statement which Dr. Franklin made in his own behalf follows:

"Thank you very much, Regent Gilbert. I do appreciate the Board of Regents giving me the opportunity to speak once again, and I will try to keep my remarks as brief as possible.

* * *

"Now, I agree with one of the Regents, with whom I spoke yesterday, who said that there was more material on this matter before the Board than on practically any other matter ever considered. What I would like to make clear is basically very simple, i.e., an affirmation on my part of what I conceive as my duties and responsibilities as a member of the Faculty of the University of Colorado. Individual Regents have expressed concern about my political views, about my political affiliations, and about views which I have expressed in writing. However, the Board of Regents is operating under its own laws, and those laws state very clearly that my political views and my political affiliations are not to enter in any way into the consideration as to the decision as to whether I should be appointed, and I hope that the Board does abide by those laws and those rules and regulations.

"The affirmation on my part is that I would like to be a member of the Faculty of the University in order to be a teacher and in order to be a scholar here. I believe I have a significant contribution to make, and I am prepared to give my personal word of honor, as well as the contractual agreement and the required oath that I will support and implement the rules and regulations applying to Faculty at the University of Colorado as well as the Constitution of the United States and the State of Colorado and the laws of the state and of the country. In fact, at the beginning of the discussion over the telephone with one of the Regents yesterday, he suggested that I should really study those rules and regulations as they applied to faculty members. I have done so, and I find myself in very enthusiastic agreement with most of those rules, and certainly find myself quite willing to accept and to abide by all of the rules.

"Pages 25 and 26 of the Faculty Handbook (1970) define academic freedom, and I think this is a very splendid definition of academic freedom, which includes the statement that 'academic freedom is defined as the freedom to inquire, discover, publish, and teach truth as the faculty members see it, subject to no control nor authority save the control and authority of the rational method upon which truth is established.' Skipping, it goes on to say that, 'The fullest exposure to conflicting opinions is the best insurance against error,' and I firmly believe that. Then it says in terms that really admit of no

varying interpretation, 'For this reason, the appointment, promotion, and dismissal of faculty members should be based primarily on the individual's ability in teaching, research, writing, or other scholarly activities and should not be influenced by such extrinsic considerations as his political, social, or religious views, or views concerning departmental or University operation or administration.' To continue, another section of the same handbook, on page 32 which is on appointment procedures, the very first sentence of appointment procedures states, 'the University will employ persons solely on the basis of merit and fitness, and will avoid favor or discrimination because of race, color, creed, sex, political affiliation, or national origin.' I totally accept that. There are many other stipulations that appear here, and I think that they are all certain things that ought to be implemented. I agree that a member of the faculty should at all times be accurate, should exercise appropriate restraint, and show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman.

"I also agree with 'Standards of Conduct' by students, and I think it also applies to the faculty in addition to students, i.e., 'as the student does not surrender his civil rights as a citizen upon enrollment, his obligations of citizenship continue.' The specific rule about disruption I also support and would follow . . . ."

* * *

"So that as far as the other concern which was expressed, that is, the role of Professor Franklin as a public citizen, I think that the Board must accept the fact that (remainder of this sentence is inaudible). We can debate about political affiliations, and we can debate about political views. I am sure that there is not one member of the Board with whom I would have any substantial agreement about political views or who would likely have the same kind of political affiliation I have, but that is irrelevant.

"I would like to conclude very simply by saying that, in addition to the normal contractual obligations which all members of this faculty have, I would give you my solemn word of honor to abide by the rules and regulations and the spirit of those rules and regulations as well as the laws of the state and the country. I thank you for your attention. I am certainly willing and eager to answer any questions that any of the Regents may have."

To a question from Regent Atkins if he would take a loyalty oath, Dr. Franklin responded as follows:

"Yes, I certainly would. I would take the loyalty oath, i.e., the oath printed in the Faculty Handbook, both to support the Constitution of the United States and the Constitution of the State of Colorado. In fact, I feel that in examining my own conduct and beliefs in 40 years or whatever portion of that I was a thinking person, I have tried my best to defend the Constitution of the

United States and of the state in which I have been living. Particularly the first amendment, the second amendment, the fourth amendment, and the fifth amendment."

DISCUSSION PRECEDING THE REGENTS' ACTION NOT TO RESCIND THE ACTION TAKEN AT THE 4/25/74 MEETING NOT TO APPOINT H. BRUCE FRANKLIN TO THE FACULTY

REGENT BETZ: I would like to ask a couple of questions. I have here an article which appeared in the June, 1972 CHANGE in which is (sic) was stated you said:

> "Now we make no attempt to hide our belief in the need for revolutionary violence as part of the struggle for people to survive against the violence of the decaying U.S. empire. We believe that the oppressed peoples of the ghettos and barrios and reservations of the U.S. must follow the example of the peoples of Indochina in waging people's war against the empire, and we see poor and working white people starting to realize that in order to survive amidst the collapse of that empire, they must actively unite with their Third World sisters and brothers. At this moment in history we believe it vital, for all who can, to oppose by any means necessary the counter-revolutionary violence being directed against the poor and working people of Indochina and the United States. Under certain circumstances it might be correct to assassinate or kidnap members of the U.S. ruling class, to burn down Stanford's computer, to ambush the police or to physically attack right-wing organizations . . ."

Is that your statement?

PROFESSOR FRANKLIN: Yes, sir, that is my statement, but I would like to clarify it. First of all, as I stated in the beginning, I do not think that it is the legal prerogative of the Board to have a person's political views entering into consideration in the matter of appointment. However, in regard to that particular statement, I think the relevant question is--how would I see that as a member of the Faculty of the University of Colorado? I can say unequivocably that I do not see now or see in the foreseeable future such circumstances arising at the University of Colorado.

In fact, I would agree with the rules on page 28. I will just paraphrase this instead of quoting a whole page. Members of the faculty have a responsibility not to engage in acts that are disruptive of University functions, not to injure persons, not to damage property on the campus, not to impede the freedom of movement of the students, school officials, employees, invited guests to all facilities of the University, and so forth. That, I think, is the relevant point, i.e., that I would pledge not to engage in any violence, not to engage in any illegal activity, and not urge and incite anybody else to engage in any violence or illegal activity.

Now, that particular passage from which you quoted, Regent Betz, was made in order to drive a point home. That magazine from which you quoted is a

magazine read by university administrators, and it was to university administrators that I was speaking; and the point here was based on the same point that I was trying to make in an earlier remark here. That the line that is drawn cannot be a line which excludes views that are considered dangerous or illegal or whatever, that is not the point.

REGENT BETZ: I happen to believe in the system of correcting these wrongs, and I agree with you many poor people are victims of many wrongs and all that. While the process which may be very cumbersome, and there may be very long delays in correcting these wrongs, I think it is much better than assassinating people or violence of any kind. Now, in addition to this article which was published, there was an article in June of 1974, involving the Patricia Hearst case and others in the NATIONAL OBSERVER. A reporter was sent out to interview and see what happened, why people were radical and so forth; and, in the article, the reporter said, he went to your home and that you took him down to Palo Alto and you took him into a building which was locked. In that building were several people, including a young girl of 17, and he interviewed those people, and he asked them point blank if they would be willing, if policemen broke in here, to shoot. They agreed they would and would leave them in a pool of blood outside and so forth. This is two years after this statement that I first quoted from CHANGE. Apparently you continue to hold those

particular views, and I cannot possibly conscientiously recommend the appointment of someone who says, "I am willing to assassinate people or otherwise revolutionize the country."

PROFESSOR FRANKLIN: Well, sir, let me respectfully make a correction. The article to which you refer does not describe anything which happened in 1974 except about the SLA. The reporter in that article is describing events which he alleges to have occurred over two years ago. I have no knowledge of any conversation that he had with other individuals.

REGENT BETZ: Were you not in the room with him . . .?

PROFESSOR FRANKLIN: I do not even know who he was.

REGENT BETZ: I would be glad to give you his name--Daniel St. Alban Green.

PROFESSOR FRANKLIN: I just simply do not know who he was. Let me just make the point very clear about that. It is clear that office in the context of the article was an office that had been attacked several times in the past, and was a newspaper office of a radical newspaper. Several other newspaper offices in the Bay area had been fire bombed and their equipment destroyed. The only way it was deemed possible to prevent that from happening was to have legal armed defense of the office. Nothing illegal was ever committed there. Nobody advocated, urged, or

incited any illegal activity. It was simply what was allowed to any business establishment. Your newspaper also has the right, if it were subject to attack to defend against such attack . . .

REGENT BETZ: But it was stated that members of the group were prepared to shoot the police if they came in.

PROFESSOR FRANKLIN: Well, again, here we are getting into the whole question of political views. My position, stated repeatedly in public--and we could call for police officials in the area to testify to this--was that policemen serving legal warrants should be allowed to serve their legal warrants. Policemen acting illegally have no more protection for their illegal activity than any other citizen of the United States, and it was a very clear understanding on that point. I never urged, advocated, incited, or engaged in any illegal activities in connection with that. That article is an attempt--and I have evidence of this--to influence your judgment in this case and to find a connection between me personally with political organizations with which were affiliated with the SLA. It is a matter of public record that I have consistently opposed the SLA and pointed out the kind of damage that it has done in the immediate past to much of the left political movement in the United States.

I think that one further point must be made. As far as the view, that I do not deny. I do express in the CHANGE article that what I think is dangerous

is that here we are talking about writing, not speaking, and, if we say those writings represent dangerous views, then we are in the business of banning books, and, in fact, we would have to ban many important works of American literature which express precisely the same view, for example, such works as Jack London's, The Iron Heel, and Sinclair Lewis', It Can't Happen Here. I was referring explicitly to the possibility of some kind of military takeover in the United States, a different situation from the situation to some extent than we have now.

In the Supreme Court of the United States

No. 77-1039

H. BRUCE FRANKLIN,
Petitioner,

vs.

DALE M. ATKINS, ROBERT M. GILBERT, PROF. BYRON L. JOHNSON, FRED M. BETZ, SR., ERIC W. SCHMIDT, THOMAS S. MOON, JACK KENT ANDERSON and RAPHAEL J. MOSES, individually and in their representative capacities as members of the Board of Regents of the University of Colorado,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN P. HOLLOWAY, ESQ.
University of Colorado
Boulder, Colorado 80309
(303) 492-6208

RICHARD A. THARP, ESQ.
University of Colorado
Regent Hall, Box 13, Room 203
Boulder, Colorado 80309
(303) 492-7481
Counsel for Respondents

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

INDEX

Authorities Cited

CASES

STATUTES AND RULES

In the Supreme Court of the United States

No. 77-1039

H. BRUCE FRANKLIN,
Petitioner,

vs.

DALE M. ATKINS, ROBERT M. GILBERT, PROF. BYRON L. JOHNSON, FRED M. BETZ, SR., ERIC W. SCHMIDT, THOMAS S. MOON, JACK KENT ANDERSON and RAPHAEL J. MOSES, individually and in their representative capacities as members of the Board of Regents of the University of Colorado,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ISSUES PRESENTED FOR REVIEW

Can the Respondents' rejection of Petitioner's initial appointment to the English faculty of a State University be judicially sustained:

1.) If the primary motivating basis for rejection is premised upon constitutionally permissible considerations; or

2.) If Petitioner fails to demonstrate that the rejection was motivated in part by constitutionally impermissible considerations; or

3.) If, assuming the elimination of any constitutionally impermissible considerations, the Respondents' action on Petitioner's appointment would have resulted in the same decision?

STATEMENT OF THE CASE

On April 25, 1974, the Respondents, eight members of the Board of Regents of the University of Colorado, voted not to appoint Petitioner to the English faculty of the University of Colorado. Subsequently, at the June 25, 1974 meeting, Respondents voted not to rescind their decision to reject Petitioner's appointment.

During the course of the decision-making process Respondents received numerous articles, background materials and general correspondence pertaining to Petitioner. This material was supplied from a variety of sources, including colleagues of Petitioner, students and the general citizenry. The materials, all of which were reviewed by the Respondents, contained a variety of comments concerning past activities of Petitioner. Included in these materials was a report by the Stanford Advisory Committee which had concluded and recommended that Petitioner should be dismissed as a tenured faculty member from Stanford University for violations which constitute "substantial and manifest neglect of duty or personal conduct substantially impairing the individual's performance of his appropriate function within the University community." (See Appendix A)

Petitioner filed suit in the United States District Court for the District of Colorado, for mandatory injunctive relief, declaratory relief and damages pursuant to 42 U.S.C. 1983 and 28 U.S.C. 2201 alleging that Respondents had violated his constitutional rights under the First and Fourteenth Amendments to the United States Constitution and, in a pendant claim, that Respondents had violated Article X, Section C of their own Laws pertaining to University governance.

On February 11, 1976, the District Court issued a Memorandum Opinion in favor of Respondents in which the Court concluded, in light of the evidence before it, that the rejection of Petitioner's appointment was primarily motivated by permissible considerations as a result of their reliance on matters contained in the Stanford Advisory Board Report. That certain impermissible considerations were present and were in fact taken into account to at least some extent by one or more of the Respondents. However, the Court, in discussing the pendant claim, determined that, even given the fact that various defendants did take into account constitutionally impermissible considerations in reaching their individual decisions, the outcome of the vote would have remained unchanged due to consideration of the existence of constitutionally permissible considerations. 409 F.Supp. 439 (1976).

Petitioner appealed to the United States Court of Appeals For The Tenth Circuit. The Court of Appeals affirmed the Trial Court holding, in light of *Mt. Healthy Board of Education* v. *Doyle*, 429 U.S. 274 (1977), 50 L.Ed. 2d 471 (1977), that Petitioner failed to meet the burden that his conduct was constitutionally protected. The Court of Appeals said that Petitioner did not demonstrate that the Stanford Advisory Report as so considered by Respondents, was in whole or in part a description of constitutionally protected conduct. Secondly, the Court concluded that, assuming the presence of impermissible considerations, Petitioner did not show that these considerations were substantial or motivating factors in the decision not to hire and, in any event, as found by the Trial Court as a matter of fact, and affirmed by the Court of Appeals upon review of the record, the Respondents' vote would have been the same had impermissible factors not been considered.

Petitioner's Petition for Rehearing *en banc* was denied October 25, 1977.

ARGUMENT IN OPPOSITION TO GRANTING OF PETITION FOR WRIT OF CERTIORARI

1. THE DECISION OF THE COURT OF APPEALS, AFFIRMING THE DISTRICT COURT'S OPINION, IS CONSISTENT WITH THE HOLDINGS AND REASONING OF THIS COURT IN *MT. HEALTHY BOARD OF EDUCATION* v. *DOYLE*, 429 U.S. 274 (1977), 50 L.Ed.2d 471 (1977).

A. Analysis of the Appropriate Judicial Inquiry Under Mt. Healthy.

The Respondents, like many other members of Boards of Regents of state universities, are charged with the responsibility to make faculty appointments to their institutions. 23-20-112, COLORADO REVISED STATUTES, 1973, reads:

> *General powers of the board.* The board of regents shall enact laws for the government of the university; appoint the requisite number of professors, tutors, and all other officers; and determine the salaries of such officers and the amount to be paid for tuition in accordance with the level of appropriations set by the general assembly for the university. It shall remove any officer connected with the university when in its judgment the good of the institution requires it.

Pursuant to judicial interpretation of state law this is a non-delegable authority. *University of Colorado* v. *Silverman*, 555 P.2d 1155 (1976). Nor are Respondents limited to a restricted inquiry in the hiring process, but may consider a broad range of factors. *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Beilan* v. *Board of Education*, 357 U.S. 399 (1958). But, Respondents cannot act to deny employment

on a basis which directly or indirectly impinges on the Petitioner's exercise of constitutionally protected rights. In so holding in *Perry* v. *Sindermann*, 408 U.S. 593 (1972) this Court recognized that an individual should have an opportunity to demonstrate the validity of an assertion that an adverse action was bottomed on impermissible considerations which affected the exercise of constitutional prerogatives. However, in *Mt. Healthy* this Court cautioned against analysis by which "an employee could place himself in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." *Mt. Healthy* at 285. Thus, this Court stated, as the proper judicial analysis,

> "Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that his conduct was a 'substantial factor or, to put it in other words, that it was a motivating factor'[2] in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." (Footnote citation to *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977); *Mt. Healthy, supra* at 287.)

This Court in referencing the *Arlington Heights* decision implicitly recognized that solely searching for a primary motivating factor is not dispositive, for a subordinate impermissible consideration may be shown to be a motivating factor, which would require shifting of the burden of proof to establish that the decision would have been the same had the impermissible considerations not been con-

sidered. *Village of Arlington Heights, supra*, n. 21 at 270, 271.

Thus, at Trial the Petitioner had the initial burden of showing that:

i) His conduct was constitutionally protected; and

ii) this conduct was a substantial or motivating factor in the Respondents' decision not to hire him.

Or, failing this proof, he must demonstrate that:

i) Other conduct that was considered was constitutionally protected; and

ii) The consideration of this conduct motivated in part the decision not to hire him.

Under either analysis, assuming Petitioner has met his burden, the judicial inquiry does not end. The burden is shifted to the Respondents to demonstrate that even if the impermissible motivating considerations were eliminated, the decision would have been the same.

B. The Decision of the Court of Appeals, Affirming the District Court, Properly Applied the Mt. Healthy Standard of Judicial Inquiry.

This Court recognized in *Village of Arlington Heights* that:

> "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence as may be available. . . . Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decision maker strongly favor a decision contrary to the one reached.
>
> The legislative or administrative history may be highly relevant, especially where there are contemporary statements made by members of the decision-making body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand to testify concerning the purpose of the official action. . . ." *Village of Arlington Heights, supra* at 270.

Likewise, seeking the primary, substantial or motivating factors which affect Respondents' decision herein, the Trier of Fact must avail himself of all available information. This was precisely what the Trial Court did,

> "There can be no more difficult task for a court than to try and discern the thought processes which lead to a certain result, much less to ascertain the *primary* motivation. In this case it it [sic] necessary to carefully consider the evidence relating to each defendant." 409 F.Supp. 439, at 447. (See Summary of Testimony, 409 F.Supp. 439 at 447, 448.)

The Court concluded that the paramount, primary motivating factor was the Respondents' reliance on the activities of Petitioner as contained in the Stanford Advisory Report. Further, the District Court concluded that the burden was on Petitioner to establish that his activities at Stanford were protected. 409 F.Supp. 439, at 450. The Trial Court concluded on the basis of an independent review of the record that his activities were not constitutionally protected. 409 F.Supp. 439, at 451, the Court of Appeals, applying *Mt. Healthy,* agreed that Petitioner failed in his threshold burden to establish his conduct, which was the substantial motivating factor in Respondents' decision, was protected. A simple failure of proof.

However, as noted in 1.A. above, the inquiry does not end if Petitioner is able to show some impermissible considerations motivated in part the adverse decision. The District Court correctly noted that certain impermissible considerations were taken into account to at least some extent by one or more of the Respondents. 409 F.Supp. 439, at 446. But, as the Court of Appeals correctly noted this is not dispositive. Petitioner likewise failed in the burden of showing these factors motivated in part the decision.

> "Assuming there were impermissible factors described in the report, or otherwise, the plaintiff did not show that these factors were a substantial or motivating factor in the decision not to hire him. The Trial court, on this point, stated that plaintiff must show that one or several of the prohibited considerations were 'paramount' in the refusal to hire. The Trial court held that plaintiff did not meet such a burden. This was a failure of proof, and we must agree with the Trial court's evaluation of the testimony. . . ." *Franklin* v. *Atkins*, 562 F.2d 1188, at 1191.

The Court of Appeals concluded that Petitioner's threshold burdens under *Mt. Healthy* had not been met. To hold otherwise would promote the very evil this Court sought to prevent in *Mt. Healthy*, to wit, an applicant might secure his position of prospective employment by injecting into a process, which by its very nature derives and considers information from a variety of sources, impermissible matters.

Assuming, arguendo, that the subordinate impermissible considerations motivated in part or played a substantial part in the decision, it does not follow, a fortiori, that a constitutional violation has occurred.

> "We are thus brought to the issue whether, even if that were the case, the fact that the protected conduct played a 'substantial part' in the actual decision not to renew would necessarily amount to a constitutional violation justifying remedial action. We think that it would not." *Mt. Healthy, supra* at 287.

The burden shifts to Respondents to demonstrate that the decision would have been the same. Even this burden was found to have been met and was affirmed in the Court of Appeals' analysis:

> "The trial court also moved to an 'in any event' position and found as a fact that the vote would have been the same had impermissible matters not been 'considered'. The trial court held (409 F.Supp. 452):
>
> > 'Since it is apparent that the outcome of the vote would remain unchanged even ignoring the considerations prescribed by university regulation, it would be futile to grant plaintiff the injunctive relief sought under those regulations.'
>
> The 'considerations proscribed by University regulations' are for all practical purposes those matters which plaintiff asserts to be constitutionally protected. The regulations require that the Regents in faculty appointments be not influenced by . . . such extrinsic considerations as his political, social or religious views." 562 F.2d 1188, at 1192.

Thus, Petitioner has failed to demonstrate the permissible nature of his conduct as described in the Stanford Advisory Board Report primarily relied on by Respondents. Nor has he met the burden of showing subordinate motivating impermissible considerations. And, in any event, the Respondents met their burden of demonstrating the decision would have remained the same even had the impermissible considerations not been considered.

2. PETITIONER'S CONTENTION THAT THE COURT OF APPEALS ADOPTED AN ERRONEOUS "FORECAST OF DISRUPTION" THEORY IS INAPPOSITE SINCE RESPONDENTS' "FORECASTS" WERE BASED ON PAST IMPERMISSIBLE CONDUCT NOT SUBJECT TO THE "PRIOR RESTRAINT" HOLDINGS OF THIS COURT IN *HEALY* v. *JAMES*, 408 U.S. 169 (1972) AND *TINKER* v. *DES MOINES INDEPENDENT SCHOOL DISTRICT*, 393 U.S. 503 (1969).

Petitioner contends that the Court of Appeals' adoption by its last paragraph in its opinion, 562 F.2d 1188, at 1192 of the District Court's analysis of the danger of disruption felt by some of the Respondents is erroneous. However, Petitioner in his analysis proceeds from a faulty assumption that the issue of prior restraint of constitutionally protected activity is involved. To be so, the prior activity of the activity to be restrained must fall within the realm of protected activity. This threshold burden was never met by Petitioner with respect to his activities which resulted in the Stanford Advisory Board Report. Respondents admit, that at first blush, the District Court's ruling on this matter, affirmed by the Court of Appeals, is misleading. But, when read in the context of the determination that Franklin's conduct, as described in the Stanford Advisory Board Report, was not constitutionally protected, the resulting conclusion is, at least, valid.

A prospective employer might reasonably conclude that he runs a risk by hiring an employee, once culpable of inappropriate behavior, that the activity will reoccur. But this is not an undifferentiated fear or prior restraint of First Amendment freedoms. Simply put, the analysis to *Healy* and *Tinker* is inapposite.

Petitioner is an entity unto himself possessed of an employment record which could not or should not be ignored by Respondents in the exercise of their decision-making responsibilities. Nor is Petitioner's interest in a teaching job at a state university, simpliciter, a free speech interest, *Board of Regents* v. *Roth*, 408 U.S. 564, 575, n. 14; *Perry* v. *Sindermann*, *supra* at 599, n. 5, which would require stricter review of the basis of the denial of this interest.

The rejection of Petitioner's employment, absent a showing that said rejection was based on constitutionally impermissible considerations, was properly sustained by the Court of Appeals.

CONCLUSION

The Petition For Writ of Certiorari should be Denied.

Respectfully submitted,

JOHN P. HOLLOWAY
University of Colorado
Boulder, Colorado 80309
(303) 492-6208

RICHARD A. THARP
University of Colorado
Regent Hall, Box 13, Room 203
Boulder, Colorado 80309
(303) 492-7481
Counsel for Respondents

APPENDIX A

EXCERPTS FROM STANFORD ADVISORY BOARD REPORT AND DECISION CONCERNING H. BRUCE FRANKLIN

DESCRIPTION OF PROCEDURES

Pursuant to the provisions of Paragraph 15 of the *Statement of Policy on Appointment and Tenure,* the Advisory Board has held hearings on the charges preferred against Associate Professor H. Bruce Franklin by President Richard W. Lyman of Stanford University. Professor Franklin requested this hearing before the Advisory Board, which is the elected body of seven faculty members charged with the review of professorial appointments and promotions at Stanford University. Our decision as to findings of fact and recommendations based upon those findings follows. In this introduction, we will deal with several related matters: representation by legal counsel for the parties and for the Advisory Board; submissions and motions made before the hearings; hearing procedures and Board rulings not a part of the transcript; the schedule for the hearings and subsequent motions; exhibits, transcripts, further attachments and an outline of our report.

A. REPRESENTATION BY LEGAL COUNSEL

As provided for in Paragraph 15a of the *Statement of Policy on Appointment and Tenure,* both parties were entitled to representation by legal counsel.

* * *

E. HEARING PROCEDURES

The Board emphasized from the outset that this was an administrative proceedings, heard by an elected body of Professor Franklin's professional colleagues at his request, and that therefore it would not be appropriate to follow narrowly any explicit external model. We were not bound by the *Statement of Policy on Appointment and Tenure* to adhere rigorously to legal rules of evidence, and we did not. We did, however, require that evidence be relevant to the charges as drawn. We also adopted as a standard of proof that "strongly persuasive" evidence of culpability be provided. Professor Franklin's *Answer to Charges* introduced alternative defense based upon necessity and upon the Nuremberg principles. Since these were not argued in the hearings, our findings do not deal with them. Further details on procedures and standards are given in the Advisory Board's Response to Motions, and in its memorandum on procedures dated September 22, 1971.

As requested by Professor Franklin, the hearing was open; it was held in Room 101 of the Physics Lecture Hall on the Stanford campus. Except for two occasions on which the hearings were disrupted for brief periods of time, the hearing atmosphere was an orderly one, and we do not believe that the procedures adopted or the conditions of the hearings presented undue disadvantages for either party. For most of the hearings, closed-circuit television and radio coverage was provided, as requested in Professor Franklin's *Motions*.

As required by the *Statement of Policy on Appointment and Tenure*, a stenographic transcript of the hearing was made, and is supplied along with this report. The hearing commenced on September 28, 1971, at 1 p.m., and concluded on November 5, 1971, at 5 p.m. In the thirty-three days of hearings, the Advisory Board met for a total

of 160 hours and heard testimony from 111 witnesses representing the University Administration and Professor Franklin. The resulting transcript contains about one million words.

* * *

FINDINGS OF FACT: THE LODGE INCIDENT

A. CHARGES

The relevant University charges concerning the Lodge incident are contained in Paragraphs 6 and 7 of the *Statement of Charges* dated March 22, 1971. These paragraphs read as follows:

> 6. On January 11, 1971, Drs. Campbell and Tompkins and Ambassador Lodge attempted to proceed with the scheduled program at Dinkelspiel Auditorium but were prevented from doing so by disruptive conduct by various people in the audience. The disruptive conduct included, among other things, loud shouting, chanting and clapping. Because of the disruptive conduct the audience was often unable to hear the words of the speakers, Ambassador Lodge was prevented from delivering his speech, and the scheduled program had to be cancelled.
>
> 7. Professor Franklin was in the audience and knowingly and intentionally participated in the disruptive conduct specified in paragraph 6, significantly contributing thereby to the disruption which prevented Ambassador Lodge from speaking and which forced the cancellation of the program. Ambassador Lodge and Drs. Campbell and Tompkins were thus denied their rightful opportunity to be heard, and members of the audience were denied their rightful opportunity to hear and to assemble peacefully.

* * *

FINDINGS OF FACT: WHITE PLAZA INCIDENT AT NOON, FEB. 10, 1971

A. CHARGES

The relevant University charges concerning the White Plaza incident are contained in Paragraph 8 of the "Statement of Charges" dated March 22, 1971. This paragraph reads as follows:

> 8. On February 10, 1971, beginning at about 12 p.m., a rally was held at White Memorial Plaza to, among other things, discuss methods of protesting developments in the war in Indochina. Over five hundred students and other persons attended. During the course of the rally two principal courses of action were discussed, one being to work in the non-University community to bring about changes in government policy, the other being to disrupt University functions and business. Professor Franklin intentionally urged and incited students and other persons present at the rally to follow the latter course of action and specifically to shut down a University computer facility known as the Computation Center. Shortly thereafter a large number of students and others left the rally and went to the Computation Center whereupon many of these persons did in fact occupy the Computation Center, prevent its operation and obstruct movement in and out of the building for several hours, terminating this unlawful activity only when ordered to leave the building by the police.

B. NATURE OF THE CHARGE

The general charge is that Professor Franklin urged and incited the disruption of University functions; the specific charge is that he urged and incited his audience to shut down a University facility, the Computation Center. Effectively, this means that his words, including their delivery and their context, significantly increased the likelihood of prohibited conduct on the part of his audience; it means, moreover, that he must have anticipated that his speech, given its delivery and context, would significantly increase the imminent likelihood of prohibited conduct.

* * *

FINDINGS OF FACT: COMPUTATION CENTER INCIDENT

A. CHARGES

The relevant University charge concerning the Computation Center incident is contained in paragraph 9 of the "Statement of Charges."

> 9. Further, on February 10, 1971 and in connection with the activity at the Computation Center described in paragraph 8, students and other persons were arrested for failure to disperse after orders had been given to clear an area around the Computation Center. Professor Franklin significantly interfered with orderly dispersal by intentionally urging and inciting students and other persons present at the Computation Center to disregard or disobey such orders to disperse.

* * *

FINDINGS OF FACT: OLD UNION COURTYARD RALLY

B. NATURE OF THE CHARGE IN PARAGRAPH 10

The charge centers on intentional incitement that threatened: (1) disruption of University activities, both individual and institutional; and (2) injury to persons and property. It implies that a risk of coercive or violent behavior existed at the time of the rally and that Pro-

fessor Franklin further increased the risk by the content and manner of his participation. In determining whether the facts fit the charges, the Board must inquire (1) What is the entire context surrounding the alleged incitement? (2) What is being communicated to the audience? (3) What would the speaker judge to be the effect of his communication on the audience?

* * *

ADVISORY BOARD DECISION

1. *Findings on University Charges*

The following numbered paragraphs of the "Statement of Charges" of the University administration require a finding by the Board: 6, 7, 8, 9 and 10. Of these, No. 6 does not involve Professor Franklin's conduct, but is sustained unanimously by the Board.

The findings of fact by the seven-member Board on those paragraphs involving Professor Franklin's conduct are as follows:

7 *The Lodge Incident*

The Board unanimously does not sustain this charge.

8 *White Plaza Rally*

The Board unanimously sustains this charge.

9 *Computation Center Incident*

The Board sustains this charge. Two members of the Board (Brown, Kennedy) do not.

10 *Old Union Courtyard Rally*

The Board sustains this charge. Two members of the Board (Brown, Kennedy) do not.

The violations sustained constitute, in the Board's judgment, "substantial and manifest neglect of duty or personal conduct substantially imparing the individual's performance of his appropriate function within the University community," and are therefore sanctionable under the *Statement of Policy on Appointment and Tenure.*

2. *Sanctions*

The Board has sustained Professor Franklin's culpability on three charges, unanimously on one charge and with two of the seven members dissenting on two charges. The University administration argues that dismissal is the appropriate penalty for each of the three offenses.

We agree that each of the offenses is a serious one; since we find Professor Franklin culpable on three charges, we need not decide whether any one alone would justify dismissal. Taken together, however, the three offenses comprise, in our judgment, major violations of the professional responsibilities and duties of a professor in this University under the *Statement of Policy on Appointment and Tenure,* the *Policy on Campus Disruptions,* and the common traditions of this and other universities. Giving the fullest weight to Professor Franklin's personal rights to advocate vigorously his political views, we are unable to escape the conclusion that by his conduct he repeatedly and seriously infringed the rights of others in the University, and significantly increased the risk of injury to them and to University property. He did so by urging and inciting to the use of illegal coercion and violence, methods intolerable in a university devoted to the free exchange and exploration of ideas.

In the preceding *Discussion of Sanctions*, all the members of the Board enumerated the factors which affect the choice of proper sanctions, once findings of facts are

established. Accordingly, we considered possible mitigating circumstances as well as those circumstances which make Professor Franklin's behavior more unacceptable. We conclude that these roughly offset each other. On balance, they do not argue against what would otherwise be the appropriate penalty for such grave offenses. Nor do we doubt Professor Franklin's own testimony that he would continue the type of behavior charged here; indeed, he considered both his own and his political associates' behavior to have been "too weak" during some of the incidents covered by the charges.

The real issue in these hearings is Professor Franklin's behavior on the offenses charged, not his political views. Diversity of political views is a great asset to the University. The charges here, however, are incitement to use of unlawful coercion and violence and increasing the danger of injury to others as means to achieving Professor Franklin's goals; it is that behavior, not his political views and their expression, which we judge unacceptable. Indeed, we note with approval that others holding and expounding extreme political views are today highly respected members of the Stanford faculty. Our decision silences neither political dissent nor criticism of the University. The only speech or behavior repressed by this Board's findings is that which clearly urges and incites others to unlawful coercion or violence, or to acts likely to increase the risk of injury to other persons. We believe such behavior should be restrained; insistence on such standards of faculty conduct will not chill open and robust dissent on this or any other campus.

The Board is also critical of Professor Franklin's deliberate choice, demonstrated by action as well as by his testimony, to attempt to protect his own position as professor in the University while at the same time inciting

others, including students, to expose themselves to expulsion or criminal charges.

Despite the severity of these offenses, we have weighed carefully possible sanctions short of dismissal. But a lesser penalty would fail to recognize the fundamental nature and severity of Professor Franklin's attacks on the University of which he is a member. Tolerance of such attacks on the freedom of others, under the guise of protecting Professor Franklin's freedom to act as he wishes, would be subversion, not support of true academic freedom and individual rights. It is precisely because unlawful coercion and violence infringe upon the rights of others in the University that the charges against Professor Franklin are such serious ones.

We believe, given all these considerations, that immediate dismissal of Professor Franklin from the University is warranted. In view of the difficulty of developing alternative sources of income at this time, we recommend that a sum equal to Professor Franklin's salary until August 31, 1972, be paid to him.